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AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~240~~ 28

THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY AND W. AND F. LIVINGSTON, APPELLANTS,

vs.

MARY S. J. McGROARTY, LUCY D. GAULT, MARY T. FITCH, AND ROBERT SIMPSON, AND JOHN R. SAYLER, ASSIGNEE OF THE SIMPSON & GAULT MANUFACTURING COMPANY, AND THE SIMPSON & GAULT MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 10, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 249.

THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY AND W. AND F. LIVINGSTON, APPELLANTS,

vs.

MARY S. J. McGROARTY, LUCY D. GAULT, MARY T. FITCH, AND ROBERT SIMPSON, AND JOHN R. SAYLER, ASSIGNEE OF THE SIMPSON & GAULT MANUFACTURING COMPANY, AND THE SIMPSON & GAULT MANUFACTURING COMPANY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 18, 1889.

said State of Michigan, bring this their bill against Robert
3 Simpson, Mary J. McGroarty, Lucy D. Gault, Mary T. Fitch, citizens and residents of the State of Ohio; Richard P. Charles, a citizen and resident of the State of New York, and John R. Sayler, a citizen and resident of the State of Ohio and assignee under the the laws of the State of Ohio of the Simpson & Gault Manufacturing Co., and the Simpson and Gault Manufacturing Co., a corporation organized under the laws of and lately doing business in the said State of Ohio and a citizen of said State of Ohio.

And thereupon your orators, humbly complaining, show to your honors that on the 25th day of May, 1885, at 1.32 o'clock p. m., there was filed in the probate court of Hamilton county by the said Simpson and Gault Manufacturing Company a deed to John R. Sayler, defendant above named, purporting to convey to the said John R. Sayler all and singular the lands, tenements, and hereditaments, appurtenances, goods, chattels, stock, promissory notes, debts, choses in action, evidences of debt, claims, demands, property, and effects of every description then belonging to the said Simpson & Gault Manufacturing Company; to have and to hold the same unto the said John R. Sayler in trust, to sell and dispose of the said property, to receive the proceeds thereof, and to apply the said proceeds arising from the sale of said property, first, to pay the lawful costs and expenses of executing the said trust; second, to pay each and all of the debts of said company in full if there should prove to be sufficient funds, and, if not, then to apply said proceeds in pay-
4 ment of said claims according to law; third, if the proceeds as aforesaid should be more than sufficient to pay and satisfy all of the creditors, then to return the balance, if any, to the said The Simpson & Gault Manufacturing Company; all of which and the terms thereof will more fully appear in said deed of assignment, a copy of which, marked "Exhibit A," is herewith filed and made part hereof.

And your orators further say that the said John R. Sayler, on the said 25th day of May, accepted the said trust created by said deed hereinbefore described, and give bond according to the laws of Ohio in such cases made and provided, and entered upon the discharge of his duties as said trustee in the administration of said trust, and is now as such assignee engaged in administering the same.

And your orators further say that by the schedule and inventories filed by said Sayler in the probate court of Hamilton county it appears, and your orator charges the fact to be, that the liabilities of the said Simpson and Gault Manufacturing Company are largely in excess of its assets; and your orators further complain and say that on the 23rd day of May, 1885, and for a long time theretofore the said The Simpson & Gault Manufacturing Company were and had been insolvent and had insufficient assets to pay their liabilities; that — insolvency of the said Simpson & Gault Manufacturing Co. had been for a long time and was then and there well known to the said Robert Simpson, who had been, on and before the
5 11th day of December, 1884, a stockholder of said company

a member of the board of directors of said company, and the president of said company.

And your orators further complain and say that on the 23rd day of May, 1885, the said The Simpson and Gault Manufacturing Company, being then and there insolvent, as aforestated, and contemplating and intending to make a general assignment of all its property to John R. Sayler as aforesaid, and after it had resolved and decided to make such assignment and to commit such act of insolvency, thereupon, at the same time and as part of the same act or transaction, with the intent to prefer the said Robert Simpson, Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, and Richard P. Charles, who then and there were or claimed to be creditors of the said The Simpson & Gault Manufacturing Co., executed in pursuance of a resolution in that behalf and for that purpose passed by the board of directors of said company, on said 23rd day of May, 1885, certain mortgage deeds from the said The Simpson & Gault Manufacturing Co. to each of the said parties of all the chattel property, consisting of stock, fixtures, machinery, etc., of the said The Simpson & Gault Manufacturing Co. and amounting in value to a sum largely in excess of the alleged indebtedness to any one of the said parties by said mortgages intended to be secured, the terms of which mortgages will more fully appear in the copies herewith filed and marked "Exhibits B, C, D, E, & F" and made a part of this bill, and to which reference is hereby made.

6 That said Robert Simpson was present at said meeting of the board of directors of said company and participated — said meeting and directed the action taken concerning the giving of said mortgages; that none of the others of said mortgagees were present or knew anything of the action taken or proposed to be taken with regards to the execution and delivery to them of the mortgages aforesaid, or any other security whatsoever, nor had they for a long time prior thereto asked for any security; that the giving of said mortgages and making of said assignment were arranged and carried out by Charles J. O'Hara, treasurer of said The Simpson & Gault Manufacturing Co., and said Robert Simpson and solely through their instrumentality and without the knowledge, consent, or co-operation of any of the other mortgagees, respondents herein; that on said 23d day of May, 1885, after said meeting and before any of said mortgagees, except said Robert Simpson, were aware of the action taken at said meeting for the purpose and in the behalf above set forth or were aware that any such action was contemplated, said Charles J. O'Hara, treasurer of said company, telephoned to C. Hammond Avery, Esq., a member of the bar, that he desired him to act as attorney of said Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, and Richard P. Charles, and that he should call at the office of the said Robert Simpson, where he would receive instructions as to what he (said Avery) was to do; that said Avery

7 thereupon called at said Simpson's office and there received the said chattel mortgages to said parties.

That said Simpson employed said Avery to act for him also and gave said Avery instructions as to what he should do.

That thereafter, on the same day, said Simpsen took said Avery in his buggy to the residence of said Lucy D. Gault, in this city, and to Mary S. J. McGroarty and Mary T. Fitch, in College Hill, Ohio, and obtained from them their respective affidavits to said mortgages; that none of said last-named three mortgagees knew of the action of said board of directors or of the execution of said mortgages until said Simpson and Avery called upon them with said mortgages; that prior to the interviews last above described said McGroarty, Gault, Fitch, and Charles had not had any conversation or communication looking to the employment of said Avery to act for them in any capacity in said matters nor had they spoken to him concerning their claims against said company, and that said Avery represented them solely upon the authority of the said telephone message of said O'Hara and of the instructions of said Simpson, and received all of his authority and instructions in the premises from them and from no one else; that said Avery, without other authority than as above stated and describing himself as the agent of said Charles, made the affidavit required by law to be made to the mortgage to said Charles; that after obtaining the affidavits of said ladies said Simpson drove said Avery to the recorder's office
8 of Hamilton county and filed the said chattel mortgages therein, said Robert Simpson directing the order in which said mortgages should be filed, and, as your orator believes and therefore charges the fact to be, that said Simpson paid the fees to the recorder for filing each of said mortgages; that accordingly the mortgage to said McGroaty was marked "filed" as of 4.25 o'clock p. m., to said Fitch as of 4.29 p. m., to said Gault as of 4.29 p. m., to said Simpson as of 4.30 p. m., and to said Charles as of 4.33 o'clock p. m. on said 23d day of May, 1885; that said 23d day of May, 1885, was Saturday, and that the said deed of assignment was filed on the 25th day of May, 1885, which was Monday.

Your orator further says that said John R. Sayler had been, prior to the 4th day of May, 1885, a stockholder and director of said The Simpson & Gault Manufacturing Co., but that on said day he transferred his stock to one F. S. Rogers and resigned his directorship for the purpose and with the understanding between himself and said O'Hara, treas'r, and the other officers of said company and with said Robert Simpson that he, said Sayler, was to become the assignee of said company; that prior to the 25th day of May, 1885, and before the alleged meeting of the board of directors of said company at which a formal resolution to make an assignment to said Sayler was passed, said Sayler had drafted a deed of assignment, a copy of which is heretofore attached as Exhibit "A," and had the same ready for execution; that before said alleged meeting of said board last afore-
9 said said O'Hara, treas., requested said Avery to take the acknowledgment to said deed of assignment, and thereupon said Avery accompanied said O'Hara to the office of said company and took the acknowledgment to said deed of assignment, it and the chattel mortgages aforesaid both being executed by Wm. T. Simpson, who is a son of said Robert Simpson, as president and by said O'Hara as treasurer of said Simpson & Gault Manufacturing Com-

pany, and that the said The Simpson & Gault Manufacturing Co. were, at the time of their assignment and are now, indebted to the Geo. T. Smith Middlings Purifier Co. aforesaid in the sum of fourteen hundred and sixty-one dollars and seventy-two cents and interest thereon from February 3rd, 1885, for no part of which said sum do the Geo. T. Smith Middlings Purifier Co. hold any security of any kind whatsoever.

Your orators further say that at the time said mortgage was executed to the said Robert Simpson, Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, and Richard P. Charles it was well known and understood by said Simpson, O'Hara, and Avery that the said The Simpson & Gault Manufacturing Co. had fully and finally determined to make and intended and contemplated making an immediate assignment of all its property and assets for the benefit of creditors.

And your orator further says that the execution of said mortgages to said Simpson, McGroarty, Gault, Fitch, and Charles and
10 the execution of said deed of assignment to said John R. Sayler were by reason of the premises and as heretofore alleged the same act of the Simpson & Gault Manufacturing Co., a part of one and the same transaction, and that the said mortgages were in substance and in fact, and your orator avers and charges them to have been, conveyances in fraud of your orator as a creditor of the said The Simpson & Gault Manufacturing Co. and in fraud of the other creditors of the said The Simpson & Gault M'f'g Co. and with fraudulent intent to prefer the said mortgagees as creditors, contrary to the provisions of the statute of Ohio regulating assignments for the benefit of creditors; and your orator further says that it has made proper and sufficient demand upon the said John R. Sayler, assignee, as aforesaid, of the said The Simpson & Gault Manufacturing Co., to bring suit against said mortgagees on behalf of the general creditors of the said The Simpson & Gault Manufacturing Co. to have said pretended mortgages to said parties declared to be fraudulent and void as against the said general creditors, including your orator, and to secure for the equal benefit of all the creditors of the said Simpson & Gault Manufacturing Co. the proceeds arising from the sale of said property in said mortgages described, but said Sayler has failed and refused to comply with said demand and refused to bring such suit for the purpose and
object aforesaid, and also have made proper and sufficient
11 demand upon the board of directors of said The Simpson & Gault Manufacturing Co. to have said mortgages set aside, which demand it has failed and refused to comply with.

And your orator further says that in the due course of the administration of his trust as assignee as aforesaid said John R. Sayler has sold and converted into money, which he now holds, all and singular the property in said mortgages described, and he will presently, unless restrained by this honorable court, distribute and pay over to said Robert Simpson, Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, and Richard T. Charls, out of the said proceeds in

his hands as assignee as aforesaid, the sums pretended to be secured by said mortgages in fraud of the rights of your orator and contrary to the law of the land, whereas the said money should be distributed among the general creditors of the said The Simpson & Gault Manufacturing Co.

To the end, therefore, that your orator may obtain relief in the premises in this honorable court, where alone adequate relief can be afforded it, it prays that the said chattel mortgages from said The Simpson & Gault Manufacturing Co. to Robert Simpson, Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, and Richard P. Charls be decreed and declared part of the same transaction with the assignment to John R. Sayler for the benefit of creditors and made with the intent to prefer the parties as creditors and as such and therefore fraudulent as against your orator; that said con-
12 veyances by mortgages to said parties may be decreed to inure to the benefit of the general creditors of the said The Simpson & Gault Manufacturing Co., including your orator, and that said John R. Sayler be ordered to apply and distribute the proceeds in his hands arising from the sale of the property in said mortgages described to the payment of the claims of the general creditors of the said The Simpson & Gault Manufacturing Co. *pro rata*, according to the laws of the State of Ohio regulating the distribution of assets of insolvents—

May it please your honors to grant unto your orator a restraining order against the said John R. Sayler, assignee as aforesaid, restraining him or his clerks, attorneys, or agents or servants, until the final hearing of this cause, from paying over or distributing to said parties or to any one for them any part of the proceeds in his hands, assignee as aforesaid, upon the claims of said parties arising under and growing out of the said mortgages hereinabove described, and that a restraining order may issue of this honorable court restraining, until the final hearing of this cause, said Robert Simpson, Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, and Richard P. Charls from transferring to innocent third parties the said mortgages or the indebtedness secured thereby, and from taking steps and proceedings in the said probate court of Hamilton county, Ohio, or elsewhere for the purpose of securing payment to them of their claims on said mortgages or any part thereof, and that your
13 — may have such further and other relief in the premises as may be consistant with equity and good conscience and to which they may be entitled in the premises.

And that your orator may obtain the relief prayed for and all such further and other relief as the nature of its case may require, may it please your honors to grant to your orator the writ of subpœna against the said John R. Sayler, assignee as aforesaid, Robert Simpson, Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, Richard P. Charls, and The Simpson & Gault Manufacturing Co., directed to them, and commanding each of them to appear by a certain day and under certain penalty therein named before your

honors in the said circuit court, and then and there to answer the premises and abide the order and decree of the court.

[Stamp Sig.]

GEO. T. SMITH MIDDLINGS PURIFIER CO.

(Signed) GEO. T. SMITH, *Pres't.*

KITTREDGE & WILBY (Signed),
Solicitors for Complainant.
J. C. HARPER (Signed),
Of Counsel.

UNITED STATES OF AMERICA,
Eastern District of Michigan, } ss:

At the city of Jackson, in the county of Jackson, State of Michigan and district aforesaid, this 28th day of October, in the year 1885, personally appeared before me, William K. Gibson, United States commissioner for said district, the above-named George T. Smith, and made oath that he is the president of the Geo. T. Smith
14 Middlings Purifier Company, the complainant above named, and that the facts set forth in the foregoing bill so far as they purport to be stated of his own knowledge are true, and so far as they purport to be stated of opinion and belief he believes them to be true.

(Signed) GEO. T. SMITH, *Pres't.*

Given under my hand this 28th day of October, in the year 1885, and sworn to before me.

(Signed) WM. K. GIBSON,
United States Commissioner for Eastern District of Michigan.

(Endorsed.)

CINCINNATI, *November 3d*, 1885.

I am security for costs in this case.

(Signed) C. L. GANO, JR.

15 EXHIBIT "A."

Know all men by these presents that whereas, by reason of dullness of business and dissap-ointments in making collections, it has become impossible for the Simpson and Gault Manufacturing Company, a corporation, to pay its maturing indebtedness, and it has therefore become necessary to wind up the business of the company and make an assignment to a trustee of the assets of the company in trust for the benefit of its creditors; and whereas, by resolutions duly passed, said company has resolved that it make an assignment to a trustee of its assets in trust for the benefit of its creditors under the laws of Ohio, and has authorized and directed the president and treasurer to execute and deliver a sufficient deed to John R. Sayler,

assigning to him the assets of the company in trust for the benefit of its creditors, under the laws of Ohio:

Now, therefore, the Simpson and Gault Manufacturing Company, a corporation under the laws of Ohio, in consideration of the premises and of one dollar to it paid by John R. Sayler, the receipt of which it hereby acknowledges, has granted, bargained, sold, assigned, transferred, and set over, and does by these presents grant, bargain, sell, assign, transfer, and set over, unto said John R. Sayler all and singular the lands, tenements, hereditaments, and appurtenances, goods, chattels, stocks, promissory notes, debts, choses in action evidences of debts, claims, demands, property, and
16 effects of every description belonging to it, wherever the same may be situated; to have and to hold the same unto said John R. Sayler in trust to sell and dispose of the said real and personal property, and to collect, sue for, and demand, receive, and recover all such sums of money as may be or become due, owing, and paying on said personal notes, debts, choses in action, evidence of debts, claims, and demands, and then in trust to apply the proceeds arising from the same as follows:

First. To pay the lawful costs and expenses of executing the trust hereby created, including reasonable attorneys' fees for legal advice in regard to the formation of the trust and for drawing this deed of trust.

Second. To pay each and all of its creditors the full sums that may be due and owing them from it: Provided, however, That if there shall not be sufficient funds with which to pay all of said debts, then to apply said proceeds in the payment of the same according to law.

Third. If the proceeds, as aforesaid, shall be more than sufficient to pay and satisfy every one of its creditors, then to pay and return to it the balance that may be left, if any, after paying all of its creditors as aforesaid.

And the said The Simpson and Gault Manufacturing Company hereby nominates, constitutes, and appoints the said John R. Sayler its true and lawful attorney, irrevocable, in its name or otherwise, for the purpose aforesaid, to execute the trust hereby created,
17 giving and granting unto the said attorney full power and authority to do and perform every act, deed, and thing requisite and necessary in the premises as fully, to all intents and purposes, as it might or could do if this assignment had not been made, with full power of substitution and revocation, hereby ratifying and confirming all that its said attorney or his substitute may lawfully do or cause to be done in the premises by virtue hereof.

In witness whereof the said The Simpson and Gault Manufacturing Company, by resolution duly passed, has hereunto caused its corporate name and seal *and* to be signed and affixed by Wm. F. Simpson, its pres't, and Chas. J. O'Hara, its treas., and these pres-

ents to be subscribed and sealed by its said pres't and treas. this 25th day of May, A. D. 1885.

THE SIMPSON & GAULT M'F'G CO.,
By W. T. SIMPSON, *Pres't*, [SEAL.]
By CHAS. J. O'HARA, *Treas.* [SEAL.]

Signed and sealed in presence of—
S. O'HARA.
C. HAMMOND AVERY.

STATE OF OHIO, } ss:
County of Hamilton, }

Be it remembered that on the 25th day of May, 1885, before me, the subscriber, a notary public in and for said county, personally came the Simpson & Gault M'f'g Co., by William T. Simpson, its president, and Chas. J. O'Hara, its treasurer, the grantor in the foregoing deed, and acknowledged the signing and sealing thereof to be its and their voluntary act and deed for the uses and purposes therein mentioned.

18 In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

[L. S.] C. HAMMOND AVERY,
Notary Public, Hamilton Co., Ohio.

I hereby accept the trust created by the above instrument and agree to faithfully perform the same.

Done at Cincinnati the 25th day of May, 1885.

JOHN R. SAYLER.

19 EXHIBIT "B."

Know all men by these presents that the Simpson and Gault Manufacturing Company, a corporation under the laws of Ohio, in consideration of thirty thousand and thirty-three and $\frac{91}{100}$ (30,033.91) dollars, to it paid by Robert Simpson, the receipt of which is hereby acknowledged, does hereby bargain, sell, and convey to the said Robert Simpson and assigns the goods and chattels described in the schedule hereunto annexed:

To have and to hold the same to the use of the said Robert Simpson, his executors, administrators, and assigns.

And said mortgagor covenants that it will insure the said property for not less than forty thousand dollars and keep the same insured during the continuance of this mortgage, and if it neglect or fail to do so, then the mortgagee may insure the same at the expense of the mortgagor, and in case of loss, if any, payment shall be made to the mortgagee for the use and purpose herein mentioned: Provided, nevertheless, That if the said The Simpson & Gault Manufacturing Company shall well and truly pay or cause to be paid at the maturity its certain five promissory notes, viz: One note of date April 23rd, 1884, for twelve hundred dollars ($1,200.00), payable in

one year from date to the order of C. J. O'Hara, with interest at 7%, and by C. J. O'Hara indorsed to the order of Robert Simpson; two notes of date May 31st, 1884, each for (4,908.35) forty-nine
20 hundred and eight and $\frac{35}{100}$ dollars, payable, respectively, in nine and twelve months from date, to the order of Robert Simpson, with interest at 7%; two notes of date December 18th, 1884, each for forty-nine hundred and eight and $\frac{35}{100}$ (4,908.35) dollars, payable, respectively, in nine and twelve months from date, to the order of Robert Simpson, with interest at 7% per annum; and if the said Simpson & Gault Manufacturing Company shall well and truly pay or cause to be paid a certain promissory note of date January 14th, 1882, for ninety-two hundred and fifty one-hundredths (9,200.50) dollars, drawn by George E. Gault to the order of the Simpson & Gault Manuf'g Co., payable in sixteen months from date, with interest at 7% per annum, and endorsed by the said The Simpson & Gault Manufacturing Co., protest waived, and now owned and held by Robert Simpson, then this conveyance shall be void; otherwise to be and remain in full force.

The said mortgagor hereby covenants that on default of payment, or any sale or attempt to sell said goods or chattels or any part of them, or to remove them or any part of them from the county or from their location, or upon any seizure of them or any part of them by process of law, or upon any failure to comply with the said provisions as to insurance, then the said mortgagee or assigns may take them into his possession.

In witness whereof the said The Simpson & Gault Manufacturing Company, by resolutions duly passed, has hereunto caused its corporate name and seal to be signed and affixed by W. T.
21 Simpson, its president, and C. J. O'Hara, its treasurer, and these presents to be subscribed and sealed by its said president and treasurer this twenty-third day of May, A. D. one thousand eight hundred and eighty-five.

THE SIMPSON AND GAULT MAN'F'G COMPANY, [SEAL.]
By W. T. SIMPSON, *Pres't*, [SEAL.]
By C. J. O'HARA, *Treas.* [SEAL.]

Signed, sealed, and acknowledged in presence of us—
JOHN E. POOR.
A. L. WELLMAN.

Statement of Claim.

THE STATE OF OHIO, *Hamilton County*, } ss:

The undersigned makes solemn oath and says he is the within-named mortgagee; that the said mortgagee has a valid claim against the within-named mortgagor, the Simpson and Gault Manufacturing Company, amounting to thirty thousand and thirty-three dol-

lars and ninety-one cents; that said claim is just and unpaid, and that the foregoing mortgage is given to secure the same.

ROBERT SIMPSON.

Swo-n to and subscribed before me, a notary public in and for said county, this 23rd day of May, A. D. 1885.

S. HAMMOND AVERY,
Notary Public, Hamilton Co., Ohio.

22 *Schedule.*

One automatic engine, Thompson, Smith & Whitehill make; one boiler, 26′ long, five-flue; one water-heater; one Tarle & Co. boiler-feeder; one double steam-pump, made by McGowan Pump Co.; one Long & Alstaller double punch machine; one trip-hammer; three anvils, in use at forges in cellar; one 54″ pulley lathe, Stetson, McFarlan & Co. make; one Gleason gear-cutter; one 24″ lathe, 22″ swing, Kidd Iron Works make; one 8′ lathe, 18″ swing, McFarlan & Nottingham make; one 12′ lathe, 32″ swing, Wm. Gleason make; one 12′ lathe, 30″ swing, Kidd Iron W'ks make; one 10′ lathe, 20″ swing, Ames M'f'g Co. make; one 8′ lathe, 16″ swing, Kidd Iron Works make; one McFarlan & Nottingham upright drill-press; one drill-press, McFarlan & Nottingham pattern, made by Simpson & Gault; one column drill-press; one Beckford upright drill-press; one emery stand and two emery wheels; one bolt-cutter and dies; one iron-planer; one shaper, Mills Tool Works make; one grind-stone, frame and pulley on same; one Fairbanks, Morse & Co. platform scales; a Betts Machine Co. shaft-straightener; one swinging cross-cut saw and table, complete; one rip-saw and table, complete; on- J. A. Fay & Co. dimension planer; one J. A. Fay & Co. tenoner; one J. A. Fay & Co. power mortiser; one J. A. Fay & Co. band saw; one McBett, Bental & Margedant boring machine; one J. A. Fay & Co. moulding machine; one McBett, Bental and Margedant universal wood-worker; one Cordesman & Bro. jig-saw; one turning lathe; one face-plate, lathe, and trustles; one Guthrue and Long wood cog ma-

23 chine; one grindstone, frame, & pulley; one Cordesman, Egan & Co. sand-papering machine; one grindstone, frame, and pulley; one set rolls for bending iron; one machine for balancing millstone; one lathe, 10′ bed, 18″ swing, Stetson & McFarlan make; one lathe, 5′ bed, 12″ swing, Putnam Machine Co.'s make; one Bickford upright drill-press; one emery stand and two emery wheels, all of the foregoing property being situated in the cellar and first & second floors of the building on the northwest corner of Front & John streets and in the building on the northwest corner of John street & Greenleaf alley, all in Cincinnati, Ohio; also all the other machinery, shafting, pulleys, belters, hangers, tools, and patterns situated and in the cellar and first and second floors of the building on the northwest corner of Front & John streets and in the building on the northwest corner of John St. and Greenleaf alley, in Cincinnati, Ohio; also all the patterns belonging to the Simpson & Gault Manufacturing Company, and being at J. W. Foley & Co.'s

foundry, 331 to 337 West Front street, and at S. C. Tatem & Co.'s foundry, N. E. corner John and Water streets, and at the Excelsior Foundry Co.'s foundry, N. W. corner of Third street and Eggleston ave., all in Cincinnati, Ohio; also all of the stock in trade, including manufactured, unmanufactured, and in process of manufacture, belonging to the Simpson & Gault Manufacturing Company, situated in the building on the northwest corner of Front and John streets, and in the building on the northwest corner of John street and Greenleaf alley, and in the frame connection thereto, in Cincinnati, Ohio, and stored in the building No. 298 East Pearl street,
24–55 Cincinnati, Ohio; also all lumber belonging to the Simpson & Gault Man'f'g Co., situated on the lot on the northwest corner of Front and Smith streets and in the yard of Wm. Thacker, on the south side of Water street, between Elm and Plum streets, all in Cincinnati, Ohio; also one Delano Drilling & Tapping Machine and office furniture, iron safe, and office fixtures, situated in the building on the northwest corner of Front and John streets, and in the building on the northwest corner of John street and Greenleaf alley, Cincinnati, Ohio; also all patterns belonging to the Simpson & Gault Manufacturing Company at Hoefinghoff & Lane's foundry, at the northeast corner of Front & Lawrence streets, in Cincinnati, Ohio; also all stock manufactured, unmanufactured, and in process of manufacture, located on sidewalk surrounding the premises, northwest corner of Front & John streets, in Cincinnati, Ohio.

(Endorsed:) Chattel mortgage. Number 2923*a*. The Simpson & Gault Man'f'g Co. to Robert Simpson. This mortgage received on the 23d day of May, 1885, at 4.31 o'clock p. m. Geo. Rabinstien, recorder.

56 And afterward, to wit, on the 30th day of December, in the year last aforesaid, came the said John R. Sayler, assignee, etc., defendant herein as aforesaid, by Sayler and Sayler, his solicitors, and filed in the clerk's office of the court aforesaid in this cause his certain demurrer, clothed in the words and figures as follows, to wit:

Demurrer of John R. Sayler, Assignee.

United States Circuit Court, Southern District of Ohio, Western Division.

THE GEO. T. SMITH MIDDLINGS PURIFIER COMPANY, a Corporation, etc., Complainant,

vs.

MARY S. J. MCGROARTY *et al.*, Defendants.

The demurrer of John R. Sayler, assignee, for the benefit of creditors of the Simpson and Gault Manufacturing Company.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to

be true in such manner and form as the same is therein set forth and alleged, demurs to said bill, and for cause of demurrer says:

1st. That it appears of the plaintiff's own showing in its said bill of complaint that the probate court of Hamilton county, Ohio, has duly acquired jurisdiction of the matters contained in said
57 bill in proceedings duly brought in said probate court, and that said proceedings are now pending in said probate court.

2nd. That the plaintiff has not in and by its said bill made or stated a case as entitled it in a court of equity to any relief against this defendant as to the matters contained in the said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

(Signed) SAYLER & SAYLER,
Attorneys for John R. Sayler, Assignee.

STATE OF OHIO, }
Hamilton County, } *ss:*

John R. Sayler, being first duly sworn, says that the foregoing demurrer is not interposed for delay.

(Signed) JOHN R. SAYLER.

Sworn to before me and subscribed in my presence this 7th day of December, 1885.

[L. S.] (Signed) ROB'T C. GEORGI,
Dep. Cl'k U. S. C. C., S. D. O.

Nelson Sayler, one of the counsel of John R. Sayler, assignee,
58 in the foregoing case, says that in his opinion the foregoing demurrer is well founded in point of law.

(Signed) NELSON SAYLER.

And afterward, to wit, on the 31st day of December, in the year last aforesaid, came the said Robert Simpson, defendant herein as aforesaid, by Thomas McDougall, Esq., his solicitor, and filed in the clerk's office of the court aforesaid in this cause his certain demurrer in the words and figures clothed as follows, to wit:

Demurrer of Rob't Simpson.

United States Circuit Court, Southern District of Ohio, Western Division.

THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY, a Corporation under the Laws of the State of Michigan, Complainants,

vs.

MARY S. J. MCGROARTY, LUCY D. GAULT, MARY T. FITCH, ROBERT Simpson, Richard P. Charles, John R. Sayler, Assignee for the Benefit of Creditors of The Simpson and Gault Manufacturing Company, and The Simpson & Gault Manufacturing Company, Respondents.

Demurrer of Robert Simpson to the bill of complaint of The George T. Smith Middlings Purifier Co., complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in such manner and form as the same are therein
59 and thereby set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainant hath not by its said bill made such a case as entitles it in a court of equity to any relief from or against this defendant touching the matters contained in the said bill or any of such matters, and for further cause of demurrer showeth that it appears by said bill that the same is exhibited against this defendant and Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, Richard P. Charls, John R. Sayler, assignee, and the Simpson & Gault Manufacturing Company for several and distinct matters and causes, in many whereof, as appears by the said bill, this defendant is not in any manner interested or concerned; by reason of which distinct matters and causes the said complainant's said bill is drawn out to a considerable length, and by joining distinct matters together which do not depend on each other in the said bill the pleadings, orders, and proceedings will, in the progress of said suit, be intricate and prolix and this defendant be put to unnecessary charges, although several parts in no way relate to or concern him.

And for further cause of demurrer this defendant saith that the same matters contained in said bill of complaint and all questions touching the validity of said mortgages and the distribution
60 of the funds arising from the sale of said mortgaged property were, at the time of the filing of said bill of complaint in this court and long prior thereto and now are, within the exclusive jurisdiction and control of the said probate court of the county of Hamilton and State of Ohio, in which cause the said complainants are parties and represented by the said trustee, John R. Sayler.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to said bill and to all matters and things therein contained and humbly prays judgment of this honorable court whether he shall be compelled to

make any other or further answer to said bill, and prays to be hence dismissed with his reasonable costs in this behalf stated.

I certify that, in my opinion, the foregoing demurrer of Robert Simpson, defendant, to the bill of complaint is well founded in law and proper to be filed in the above case.

(Signed) THOS. McDOUGALL,
Att'y for Robert Simpson, Defendant.

UNITED STATES OF AMERICA,
Southern District of Ohio, County of Hamilton, } ss:

Robert Simpson, being duly sworn, does depose and say that he has read the foregoing demurrer to the bill of complaint in this suit and the same is not interposed for the purpose of delaying this suit or any proceeding therein.

61 (Signed) ROBERT SIMPSON.

Sworn to before me and subscribed in my presence this 30th day of December, A. D. 1885.

[L. S.] (Signed) WILLIS M. KEMPER,
Notary Public, Hamilton County, Ohio.

62 And afterwards, to wit, on the day and year last aforesaid, came the said Mary S. J. McGroarty, defendant herein as aforesaid, by Avery & Holmes, her solicitors, and filed in the clerk's office of the court aforesaid in this cause her certain demurrer,
63 clothed in the words and figures as follows, to wit:

Demurrer of Mary S. J. McGroarty and Mary T. Fitch.

U. S. Circuit Court, S. D. O., W. D.

THE GEO. T. SMITH MIDDLINGS PURIFIER CO.
vs.
MARY S. J. MCGROARTY *et al.* } 3814.

Mary S. J. McGroarty and Mary T. Fitch severally, not confessing any of the allegations of the bill of complaint to be true, seve-ally demur to said bill—

1st. Because it appears therein that the probate court of Hamilton county, Ohio, has exclusive jurisdiction acquired of the matters contained in the bill of complaint, and said matters are now and were pending in said probate court at the time of the filing of said bill, and complainants were represented by John R. Sayler, trustee.

2nd. Because said bill — not set forth matter sufficient to entitle it to the relief sought or any relief in equity.

Wherefore each humbly demands judgment whether she shall be compelled to make further answer to said bill, and prays to be dismissed with her costs.

(Signed) AVERY & HOLMES,
Attorneys for Mary S. J. McGroarty and Mary T. Fitch.

STATE OF OHIO, *Hamilton County,* } ss:

64 Mary T. Fitch and Mary S. J. McGroarty severally on oath say that the foregoing demurrer is not interposed for delay.

(Signed) MARY T. FITCH.
(Signed) MARY S. J. McGROARTY.

Subscribed and sworn to before me this 4th day of January, 1886.

[L. S.] (Signed) JOHN E. BRUCE,
Notary Public, Hamilton County, Ohio.

C. Hammond Avery, of counsel for Mary T. Fitch & Mary S. J. McGroarty, says that in his opinion the foregoing demurrer is well founded in law.

(Signed) C. HAMMOND AVERY.

65 And afterward, to wit, on the 10th day of February, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause; and which said entry is clothed in the words and figures as follows, to wit:

Journal Entry W, 296.

THE GEORGE T. SMITH MIDDLINGS PURIFIER CO. *vs.* MARY S. J. McGROARTY *et al.* } In Equity.

This cause coming on to be heard upon the demurrers of respondents to the complainant's bill and the arguments of counsel, on consideration whereof the court considers said demurrers well taken and sustain the same; wherefore it is ordered by the court that said bill be, and is hereby, dismissed; to all of which complainant excepts. It is further ordered that complainant pay the costs of this case, taxed at $—.

And afterward, to wit, on the day and year last aforesaid, came the said complainant, by its solicitors aforesaid, and filed in the clerk's office of the court aforesaid its certain amendment to bill in this cause, endorsed, "Let this amended bill be filed;" (signed) "Baxter;" and which said amendment to bill so as aforesaid filed is clothed in the words and figures as follows, to wit:

Am'd't to Bill.

66 United States Circuit Court, Southern District of Ohio.

THE GEO. T. SMITH MIDDLINGS PURIFIER CO., WM. S. LIVINGSTON, *et als.* *vs.* MARY S. J. McGROARTY *et al.* } No. 3814. In Equity.

Now comes complainants, The Geo. T. Smith Middlings Purifier

Company and William S. Livingston, Francis Livingston and William S. Livingston, Jr., partners as W. & F. Livingston, and by leave of court file this their amendment to the bill of complaint herein, and show to the court that William S. Livingston, Francis Livingston, and William S. Livingston, Jr., are residents and citizens of the State of New York. Your orators further show to the court "that — the" November term, 1885, of the court of common pleas of Hamilton county, Ohio, said William S. Livingston, Francis Livingston, and William S. Livingston, Jr., partners as W. & F. Livingston, recovered a judgment against said The Simpson & Gault Manufacturing Company, by the consideration of said court, for the sum of ten thousand eight hundred and twenty-two $\frac{89}{100}$ ($10,822.89) dollars, with interest from the 25th day of May, 1885, and that said judgment is unreversed and wholly unsatisfied, and that they hold no security whatever therefor; that an execution issued thereon has been returned: "No goods or chattels, lands or tenements, found whereon to levy."

67 Your orators further say that said Avery, having received said mortgages from said Simpson, as stated in the bill herein, presented them to the mortgagees, who accepted the same and made the affidavits thereto required by the statutes of Ohio, as appears by the exhibits to the bill filed herein and made part hereof, and said mortgagees then handed the same back to said Avery, but without giving any direction or instruction (as to what he, said Avery, should do with said mortgages), either then and there or prior or subsequent to such verification, other than as stated in the bill of complaint herein.

Wherefore complainants pray as in their bill of complaint herein.

(Signed) KITTREDGE & WILBY,
(Signed) J. C. HARPER,
Solicitors for Complainants.

THE UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

J. C. Harper, being duly sworn, says that the said William S. Livingston, Francis Livingston, and William S. Livingston, Jr., are non-residents of and now absent from the State of Ohio, and that said George T. Smith Middlings Purifier Company is a foreign corporation, having no office in the State of Ohio; that he is one of the attorneys of said complainants; that the statements contained in the foregoing amendment to bill are true, according to his

68 knowledge, information, and belief.

(Signed) J. C. HARPER.

Sworn to and subscribed before me this 20th day of February, 1886.

[L. S.] (Signed) ROB'T C. GEORGI,
Dep. Clk U. S. C. C., S. D. O.

And afterward, to wit, on the day and year last aforesaid, an entry

was made upon the journal of the court aforesaid in this cause; which said entry is clothed in words and figures as follows, to wit:

Journal Entry W, 310.

THE GEO. T. SMITH MIDDLINGS PURIFIER COMPANY
vs.
MARY S. J. MCGROARTY *et al.*
No. 3814. In Equity.

The court, upon motion of the complainants, sets aside the order heretofore made in this cause, sustaining the demurrer and dismissing complainants' bill, and upon application of complainants, and it appearing to the court that Richard P. Charls has not been served with process, this cause, as to him, is dismissed at complainants' costs without prejudice.

Upon their application and with consent of complainants, William S. Livingston, Francis Livingston, and William S. Livingston, Jr., partners as W. & F. Livingston, are joined as co-complainants with the Geo. T. Smith Middlings Purifier Company in their
69 bill of complaint against the respondents herein.

And upon their application complainants are given leave to file an amendment to their bill of complaint herein, which is accordingly done; and this cause now coming on to be heard upon the demurrer of respondents, the same to be considered by consent of all parties, as directed, to the bill as now amended, and having been argued by counsel and submitted to the court, on consideration whereof the court sustains said demurrers and dismisses the bill and amendment at the costs of complainants, to be taxed.

And thereupon came the complainants in open court and prayed an appeal of this cause to the Supreme Court of the United States, which was allowed by the court, and the bond fixed at $500, to be given to the satisfaction of the clerk.

And afterwards, to wit, on the 3rd day of March, in the year last aforesaid, came the complainants aforesaid, by their said solicitors, and filed in the clerk's office of the court aforesaid in this cause their certain appeal bond, clothed in words and figures as follows, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio.

THE GEO. T. SMITH MIDDLINGS PURIFIER COMPANY
70 *vs.*
MARY S. J. MCGROARTY *et al.*

Know all men by these presents that we, The George T. Smith Middlings Purifier Company and William S. Livingston, Francis Livingston, and William S. Livingston, Jr., partners as W. & F. Livingston, as principals, and Jacob R. Stewart and Joseph Sharp, as sureties, are held and firmly bound unto Mary S. J. McGroarty, Lucy

D. Gault, Mary T. Fitch, Robert Simpson, John R. Sayler, assignee of the Simpson & Gault Manufacturing Company, and The Simpson & Gault Manufacturing Company in the sum of five hundred dollars, to be paid to the said Mary S. J. McGroarty and others as aforesaid, their heirs, executors, and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this second day of March, 1886.

Whereas the above-named The Geo. T. Smith Middlings Purifier Company and W. & F. Livingston have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

71 Now, therefore, the condition of this obligation is such that if the above-named The Geo. T. Smith Middlings Purifier Company *et al.* shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) JACOB R. STEWART. [SEAL.]
(Signed) JOSEPH SHARP. [SEAL.]

Sealed and delivered in presence of—
ROBERT C. GEORGI. (Signed.)
C. R. NEVIN. (Signed.)

The above security is approved.
[L. S.] (Signed) B. R. COWEN, *Clerk.*

(*Affidavits of Sureties Annexed.*)

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Jacob R. Stewart, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth five thousand dollars in real estate, in my own name, situate in the county of Hamilton, in said district.

(Signed) JACOB R. STEWART.

Sworn to before me the 2d day of March, 1886.
[L. S.] (Signed) ROBERT C. GEORGI,
Dep. Clerk U. S. Circuit Court. S. D. Ohio.

72 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Joseph Sharp, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth five thousand dollars in real estate, in my own name, situate in the county of Hamilton, in said district.

(Signed) JOSEPH SHARP.

Sworn to before me the 3rd day of March, 1886.
[L. S.] (Signed) ROB'T C. GEORGI,
Dep. Cl'k U. S. Circuit Court, S. D. O.

And afterward, to wit, on the day and year last aforesaid, there was issued out of the said the clerk's office of the court aforesaid in this cause our certain writ of citation, directed to the said defendants herein aforesaid; and which said writ of citation so as aforesaid issued and directed, with the return of the marshal of the district aforesaid making service of the same upon said defendant, endorsed thereon, is hereto annexed, as follows, viz:

73 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, Robert Simpson, John R. Sayler, assignee of The Simpson & Gault Manufacturing Company, and The Simpson & Gault Manufacturing Company, Greeting:

Whereas The Geo. T. Smith Middlings Purifier Company and W. & F. Livingston have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Ohio, made in favor of you, the said Mary S. J. McGroarty and others, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Cincinnati, in the sixth circuit, this third day of March, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

GEORGE R. SAGE,
U. S. District Judge, S. D. O., Sitting and Holding the Circuit Court for said District, no Circuit Judge or Circuit Justice Being Present.

[Endorsed:] United States circuit court, southern dist. of Ohio. No. 3814. The Geo. T. Smith Middlings Purifier Company *vs.* Mary S. J. McGroarty *et al.* Citation to appellee. Filed March 5th, 1886. B. R. Cowen, clerk.

Received this writ, at Cincinnati, Ohio, on the 3d day of March, 1886, and on the 4th day of March, 1886, at College Hill, Ohio, I served the within-named Mary S. J. McGroarty by delivering to her personally a true copy of this writ, and served the within-named Mary T. Fitch with a true copy of this writ, left at her usual place of residence.

H. C. UMER, *U. S. Marshal,*
By C. A. COSTELLO, *Deputy.*

2 services	4 00
2 copies	1 00
8 miles	48
	$5 48

On the 5th day of March, 1886, I served Robert Simpson and John R. Sayler, assignee of the Simpson and Gault Manufacturing Company, by delivering to each personally a true copy of this writ, and served Lucy D. Gault with a true copy of this writ, left at her usual place of residence, and on the same day I served the within-named The Simpson and Gault Manufacturing Company by delivering to Robert Simpson, the president of the same, a true and correct copy of this writ, and by leaving a true copy of this writ at the usual place of residence of George E. Gault, the secretary of said company.

H. C. UMER, *U. S. Marshal*,
By J. KIERSLETT, *Deputy*.

5 services	10 00
5 copies	2 50
4 miles	24
	$12 74

74 UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio:

I, B. R. Cowen, clerk of the circuit court of the United States for the division and district aforesaid, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of the court aforesaid in the cause therein mentioned as the same remains on file and of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of Cincinnati, in the division and district aforesaid, this 9th day of March, A. D. 1886, and in the 110th year of the Independence of the United States of America.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk*,
By ROB'T C. GEORGI, *Deputy*.

April 8, '86, rec'd $23.55, costs of transcript.

B. R. COWEN, *Cl'k*,
Per GEORGI.

75 The Supreme Court of the United States.

THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY *et al.*, Appellants,
vs.
MARY S. J. MCGROARTY *et al.*, Appellees.

Appeal from the circuit court for the southern district of Ohio, western division.

Stipulation as to Parts of Record to be Printed.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that, for the purpose of presenting the errors complained of in the record in this cause, the plaintiffs in error shall print or cause to be printed only so much and such parts of the record as are herein named—that is to say, there shall be printed of such record—

The bill of complaint and Exhibits A and B, filed with the bill of complaint.

The amendment to the bill.

The demurrer of Robert Simpson.

The demurrer of John R. Sayler, assignee.

The demurrer of Mary S. J. McGroarty.

The entire transcript of the docket and journal entries.

The assignment of errors and prayer for reversal.

And it is agreed that all other parts of the record not above named need not be printed.

In witness whereof the parties above named, by their counsel, have hereunto subscribed their names.

Cincinnati, Oct. 2d, 1888.

JOSEPH WILBY,
For Appellants.
J. C. HARPER,
For Appellants.
THOS. McDOUGALL,
Att'y for Appellees.

76 [Endorsed:] The Supreme Court of the United States. 1888, October term. No. 249. The Geo. T. Smith Middlings Purifier Company, appellants, *vs.* Mary S. J. McGroarty *et al.*, appellees. Stipulation as to omissions in printing record. Joseph Wilby, for appellants. J. C. Harper, for appellants. Thos. McDougall, — appellees.

[Stamped:] Office Supreme Court U. S. Filed Oct. 5, 1888. James H. McKenney, clerk.

Endorsed on cover: S. Ohio C. C. U. S. No. 249. The George T. Smith Middlings Purifier Company and W. and F. Livingston, appellants, *vs.* Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, & Robert Simpson, & John R. Sayler, assignee of the Simpson and Gault Manufacturing Company, and The Simpson & Gault Manufacturing Company. Filed April 10, 1886.

Supreme Court, U. S.
FILED,
MAR 16 1889
JAMES H. McKENNEY,

Robert Clarke & Co., Printers, Cincinnati.] [March, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

The George T. Smith Middlings Purifier Company and W. & F. Livingston,

Appellants,

No. 249.] *vs.*

Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, Robert Simpson, John R. Sayler, Assignee of the Simpson & Gault Manufacturing Company, and the Simpson & Gault Manufacturing Co.,

Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Ohio, Western Division.

BRIEF FOR APPELLANTS.

KITTREDGE & WILBY,
BATEMAN & HARPER,
For Appellants.

JOSEPH WILBY,
J. C. HARPER,
Of Counsel.

Robert Clarke & Co., Printers, Cincinnati.] [March, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

The George T. Smith Middlings Purifier Company and W. & F. Livingston,

Appellants,

No. 248.] *vs.*

Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, Robert Simpson, John R. Sayler, Assignee of the Simpson & Gault Manufacturing Company, and the Simpson & Gault Manufacturing Co.,

Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Ohio, Western Division.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This case comes into this court upon appeal from a decree of the Circuit Court of the United States for the Southern District of Ohio, sustaining demurrers of the defendants to the bill of complaint filed by the appellants, and dismissing it at their costs.

The appellants, complainants below, are unsecured creditors of the Simpson & Gault Manufacturing Company.

The Simpson & Gault Manufacturing Company is a corporation under the laws of the State of Ohio, and John R. Sayler is its assignee for the benefit of creditors, and Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, and Robert Simpson are preferred creditors by reason of certain chattel mortgages executed by the company.

The bill was filed by the complainants for the purpose of having the chattel mortgages to the individual defendants above named set aside, or be declared to be a part of the general assignment for the benefit of creditors, and as such to inure to the benefit of all creditors ratably, according to their demands.

The bill alleges that on the 25th day of May, 1885, there was filed in the Probate Court of Hamilton county, Ohio, a deed of assignment from the said company to John R. Sayler, conveying to him all the property of the said Simpson & Gault Manufacturing Company in trust, to sell and dispose of said property and apply the proceeds to pay the costs and expenses of executing the trust; to pay each and all of the debts of said company in full, if the proceeds should be sufficient; and if not, then to apply said proceeds in payment of said claims according to law; and finally, if there should be any balance, to return the same to said company. (R. p. 2.) The deed of assignment is attached to the bill and made part thereof, and is found on pages 7 to 9 of the record.

The bill also alleges that on May 23, 1885, and long prior thereto, the Simpson & Gault Manufacturing Company was and had been insolvent, and having resolved and decided to make a general assignment for the benefit of

creditors, and having previously selected John R. Sayler as its assignee, at the same time and as a part of the said assignment for the benefit of creditors, and with intent to prefer Robert Simpson, Mary S. J. McGroarty, Lucy D. Gault, and Mary T. Fitch, who were creditors of said company, executed to them, in pursuance of a resolution of the board of directors, certain mortgage deeds, conveying to each of said parties all the chattel property of the said company, amounting in value to a sum largely in excess of the alleged indebtedness to any of said mortgagees. (R., p. 3.) Copies of said mortgages were attached to the bill; one of them is printed in the record, on pages 9 to 12. All of the mortgages covered identically the same property, and were alike in all respects except the names of the mortgagees and the amounts secured. The claims secured by said mortgages to the several parties were as follows: Mary S. J. McGroarty, $5,700.00; Lucy D. Gault, $900.00; Mary T. Fitch, $3,078.25; Robert Simpson, $30,033.91. All of this indebtedness, except part of Simpson's, was not due. Upon one of the notes secured by the mortgage to Simpson, O'Hara, the treasurer of the company, who executed the mortgages, was liable as an indorser. All the said mortgages contained a covenant that the mortgagor would keep the property insured for not less than forty thousand dollars ($40,000).

The bill also sets out the details of the transaction, and shows that as early as the 4th day of May, 1885, John R. Sayler had transferred his stock in the company and resigned his directorship for the purpose of becoming the assignee of the company, as was agreed and understood between himself and Charles J. O'Hara, the treasurer of the company, and Robert Simpson, who was one of the chattel mortgagees. (R., p. 4.)

Robert Simpson had been a stockholder, director, and president of the company, up to the 11th day of December, 1884; and was present at the meeting of the board of directors, and participated in and directed its action, when it was determined to make the deed of assignment and give the chattel mortgages sought to be set aside. He, with Charles J. O'Hara, the treasurer, was the only active participant in the transaction.

After the mortgages were executed, the treasurer (Mr. O'Hara) employed Mr. Avery, a member of the bar, to take the affidavits of the mortgagees, and he, in company with Mr. Simpson, called upon Mrs. Gault, Mrs. McGroarty, and Mrs. Fitch, and obtained from them their affidavits to the mortgages. These mortgagees had not asked for security, and knew nothing of the execution of the mortgages, until they were presented to them by said Simpson and Avery; and then gave no direction as to what should be done with them. Said Avery, acting upon the instruction of the said O'Hara, and without any other authority, made affidavit to a mortgage, to one Charls. Subsequently all the mortgages were delivered by said Simpson and Avery at the recorder's office in Hamilton county, Ohio, late on the evening of May 23, 1885, which was Saturday; the said Simpson directing the order of filing of said mortgages, and paying the fees for such filing. (R., p. 2–4.)

It is alleged specifically, that said mortgages and deed of assignment were intended by the parties, and were in fact, part of the same transaction or disposition of the entire property of the corporation, with intent to prefer the chattel mortgagees; and that said mortgages operated as a fraud upon the statute of Ohio, and violated the rights of the general creditors. (R., pp. 3 and 5.)

The bill shows that John R. Sayler, on May 25th,

accepted the trust created by the deed of assignment, and gave bond, and entered upon the discharge of his duties in the administration of his said trust, according to the laws of the State of Ohio; and that, in the course of such administration of said trust, he took possession of the property described in said mortgages (the said chattel mortgagees never having made any effort to take possession of said property), and has sold and converted the same into money, which he now holds, and, unless restrained, will distribute and pay over to the said chattel mortgagees the amount of their claims out of the proceeds of said sale, contrary to the rights of the complainants. (R., pp. 2 and 5.)

The bill also shows that the complainants made demand upon said Sayler, assignee, and upon the directors of said corporation, to bring a suit for the purpose of having the said mortgages set aside, or declared to be for the benefit of all creditors; and that both said assignee and said board refused to bring such suit.

To this bill, the defendants interposed demurrers. The demurrers of Mary S. J. McGroarty, Mary T. Fitch, and Lucy D. Gault are identical. One only is printed, which appears on page 15 of the record. Sayler, assignee, also demurred to the bill. (R., p. 12.) These parties alleged two grounds of demurrer, to-wit: (1) that the bill showed that the Probate Court of Hamilton county, Ohio, had acquired exclusive jurisdiction of the matters set up therein, and (2) want of equity.

The demurrer of Robert Simpson, in addition to the grounds of want of jurisdiction and want of equity, charged that the bill was multifarious. (R., pp. 14, 15.)

These demurrers the court sustained, and dismissed the bill at the costs of the complainants. To which action of

the court they excepted, and prayed an appeal, which was allowed. (R., p. 18.)

The prominent features of the case, as presented by the bill, are as follows:

First. That at the time of the execution of the chattel mortgages, the Simpson & Gault Manufacturing Company, a corporation, was not only insolvent, but had finally determined to surrender its property and make a general assignment for the benefit of creditors; and that the execution of the preferential chattel mortgages and the deed of assignment constituted a single plan or arrangement, disposing of the entire assets of the corporation, and were a part of the same act or transaction, with intent to prefer the chattel mortgagees, and as part of the general assignment.

Second. That, with the exception of Robert Simpson, the other mortgagees were in no sense diligent creditors; had no knowledge of, and took no part in, the steps to secure the preferences they now claim. Their claims were not due; they had made no demand for security; and the case is, therefore, one of the preferential parceling out of its assets by on insolvent debtor.

Third. Robert Simpson did not stop with securing himself, but was the principal and active agent in obtaining the security for the other chattel mortgagees.

Fourth. Charles J. O'Hara, one of the directors, and the treasurer of the company who executed the chattel mortgages, secured an advantage to himself, at the expense of the general creditors, by securing the payment of a note, held by Robert Simpson, upon which he was liable as indorser.

ASSIGNMENT OF ERROR.

The appellants assign as error the action of the court below in sustaining the demurrers of the defendants to the bill of complaint, and the dismissal of said bill at the costs of the complainants. (Rec., p. 18.)

ARGUMENT.

I.

THE DEMURRERS TO THE JURISDICTION OF THE CIRCUIT COURT WERE NOT WELL TAKEN.

The Circuit Court held that it had jurisdiction, and the sustaining of the demurrers was not upon that ground; but, inasmuch as counsel for appellees have indicated their intention to press this ground in this court, we shall briefly notice the question of jurisdiction.

The appellants brought their bill below charging the preferential mortgages to have been executed as part of the same transaction with the deed of assignment of the Simpson & Gault Manufacturing Company, and, as such, fraudulent against the general creditors, and contrary to the provisions of the statute of Ohio regulating assignments for the benefit of creditors.

John R. Sayler, the assignee of the Simpson & Gault Manufacturing Company, had been, as is shown by the averments of the bill (Rec., p. 5), requested by appellants to bring such a bill for and on behalf of the general creditors; but he had refused so to do, and thereupon this bill was filed by the appellants.

The language of the several demurrers attacking the jurisdiction of the Circuit Court, appears slightly different

in each; and we, therefore, quote the same from the various demurrers.

Robert Simpson's demurrer (Rec., p. 14):

"That the same matters contained in said bill of complaint, and all questions attacking the validity of said mortgages and the distribution of the funds arising from the sale of said mortgaged property, were, at the time of the filing of said bill of complaint, within the exclusive jurisdiction and control of the said Probate Court of the County of Hamilton and State of Ohio, in which cause the said complainants are parties and represented by the said trustee, John R. Sayler."

As to the form of this demurrer, we have to say that it is not alleged in the bill, nor is it true in fact, that the said complainants are or were parties to the proceedings in the Probate Court of Hamilton county, alluded to in the said ground of demurrer.

Mary S. J. McGroarty, in her demurrer (Rec., p. 15), demurs because:

"It appears therein (in said bill) that the Probate Court of Hamilton county has exclusive jurisdiction acquired over the matters contained in the bill of complaint; and the said matters are now and were pending in said Probate Court at the time of the filing of said bill; and complainants were represented by John R. Sayler, trustee."

John R. Sayler, in his demurrer (Rec., p. 13), says:

"That it appears of the complainants' own showing in said bill of complaint, that the Probate Court of Hamilton county, Ohio, has duly acquired jurisdiction of the matters contained in said bill by the proceedings duly brought in said Probate Court; and that said proceedings are now pending in said Probate Court."

The assignment of the Simpson & Gault Manufacturing Company to John R. Sayler for the benefit of its creditors was by an Ohio corporation, in Ohio, under the laws of Ohio regulating assignments for the benefit of creditors, and was, in accordance with the provisions in that behalf, filed in the Probate Court of Hamilton county.

It will not be disputed that the Probate Court of Hamilton county, Ohio, is a court of limited jurisdiction, having no powers save those expressly conferred upon it by statute. But it is claimed by respondents that the legislature of Ohio has seen fit to bestow upon the Probate Court exclusive equity jurisdiction in certain cases, and that one of those cases is provided by section 6351 of the Revised Statutes of Ohio, amended, 77 Ohio L. p. 189. Said section 6351 is one of the sections of the chapter regulating assignments for the benefit of creditors in Ohio. Of that chapter, section 6335 provides:

That the deed of assignment shall be filed with the Probate Judge, and that a bond shall be given by the assignee for the faithful performance of his duties.

Section 6346 provides for a notice by advertisement to be given by the assignee of his appointment.

Section 6347 provides for the appointment of appraisers as soon as the assignee gives bond, who shall make an inventory and appraisement of the entire assets of the assignor.

Section 6349 provides for an examination, upon the application of any creditor, or of the assignee, of the assignor as to the honesty of his assignment; and also as to an examination of the assignee or any other person upon any matters pertaining to the estate of the assignor or of the administration of the trust.

Section 6350 provides that the assignee shall proceed

at once to convert all the assets received by him from the assignor into money. And provides for a public or private sale under certain conditions.

Section 6351, above noted, and as amended, provides for the payment of incumbrances and liens out of the proceeds of the sale provided for in the previous section.

There is nothing in the whole chapter providing the Probate Court with the means of bringing in parties to answer to pleadings; nor has the Probate Court the power to issue a summons, except in a few specified cases, not including any cases embraced in the provisions of the chapter regulating assignments under consideration. Indeed, the proceedings in case of assignments are of a purely administrative character, and except in occasional instances, no controversy arises, no issue is presented to be determined, and no parties are in any sense, in theory or in fact, before the court. Such being the character of the proceedings in the Probate Court, in which the deed of assignment in question was filed, let us now look at the state of the record upon which the appellees claimed under their demurrers to the jurisdiction.

The deed of assignment was filed on the 25th day of May, 1885. The preferential chattel mortgages alleged by the bill to be part of the deed of assignment were filed on the 23d day of May, 1885 (the intervening day, the 24th, being Sunday). The proceedings thereafter in the administration of the trust proceeded in the Probate Court, the property was appraised and sold, and the proceeds came into the hands of John R. Sayler as assignee. There were no parties to the proceedings in any sense, up to this time. Indeed, there was no controversy raised there by appellants, or by any other creditor. No summons, citation, or process of any kind had been served or issued for any

creditor or other person interested in the administration of the trust; no attack had been made upon the assignment or upon the mortgages; no pleading or claim of any kind had been filed asserting any right, legal or equitable, as against any of the mortgagees or the assignee, or as against the interest of any one; in short, the proceedings were simply administrative in their character, and disclosed no issue or controversy raised either by pleadings or otherwise.

Such being the record and the state of the proceeding in the Probate Court on the 4th day of November, 1885, appellants having by this time discovered from an examination of the preferential mortgages and the assignment, and other information they had by that time acquired, as to the circumstances under which they were executed, concluded that the mortgages and the deed of assignment taken together, as they were in fact executed as parts of the same transaction, came within the inhibition of section 6843 of the Ohio Statutes, and that, therefore, the mortgages, as preferences, were void as against the general creditors, and inured to the equal benefit of all. And, thereupon, on the 4th day of November, 1885, appellants filed their bill in this cause showing such facts with reference to the mortgages and the deed of assignment, and praying that the said mortgages be declared to be within the inhibition of the statute aforesaid, and decreed to inure to the equal benefit of all creditors. Subpenas were served upon all the appellees; and, thereupon, as our contention is, the Circuit Court acquired jurisdiction, *prior* jurisdiction, over the parties and subject-matter of the controversy between the appellants and the appellees upon the matter set forth in the bill. It is not contended by counsel for appellees that any summons, or

notice, or citation of any kind was served upon appellants in the Probate Court *prior* to the filing of this bill; nor is it pretended that the record in the Probate Court showed any controversy or parties at the date of the filing of the bill.

Gaines v. *Fuentes*, 92 U. S. 10.
Fiske v. *Hills*, 11 Bissell, 294.
Craigie v. *McArthur*, 4 Dillon, 474.
Shelby v. *Bacon*, 10 Howard, 56.

So that applying the well known principle that of two courts having concurrent jurisdiction, the court which first acquires jurisdiction of the subject-matter and of the parties, has, by comity and of necessity, the right to adjudicate on the subject in controversy.

The Circuit Court below first acquired and now has jurisdiction of the matters set forth in the bill.

Orton v. *Smith*, 18 Howard, 263.
Shelby v. *Bacon*, 10 Howard, 56.
Greene v. *Creighton*, 23 Howard, 90.

So that the appellees, in sustaining their attack upon the jurisdiction of the Federal Courts to maintain this bill, are forced to the contention that by the statutes and decisions of Ohio, the Probate Court, *upon the filing of the deed of assignment*, then and thereby acquired an exclusive jurisdiction to determine any controversy that might subsequently arise in the administration of the assignment, including the controversy shown by the bill in this cause, and that thereby, and by such legislation and decisions of Ohio, the jurisdiction in equity of the Federal Courts has been abated and diminished to that extent. And that consequently a non-resident creditor with a full and perfect equitable right as against the said mortgagees, can not in

Ohio, though he could in other states, have his cause tried by a Federal tribunal.

It is too palpable for argument that this is the very kind of attempted limitation and restriction upon the equitable jurisdiction of the Federal Courts as between litigants of the proper diverse citizenship that has been repeatedly ignored and repudiated, and the jurisdiction of the United States Courts upheld and maintained whenever it has been attempted.

Shelby v. *Bacon*, 10 How. 56.
Payne v. *Hook*, 7 Wallace, 425.
Gaines v. *Fuentes*, 92 U. S. 10.
Hess v. *Reynolds*, 113 U. S. 73.
Ellis v. *Davis*, 109 U. S. 485.
Fleischer v. *Greenwald*, 20 Fed. Rep. 547.
Simon v. *Oppenheimer*, 20 Fed. Rep. 553.
Hart v. *Sansom*, 110 U. S. 151.
McConihay v. *Wright*, 121 U. S. 201, 206.

II.

THE PREFERENTIAL CHATTEL MORTGAGEES WERE NOT DILIGENT CREDITORS, AND FOR THAT REASON ALONE, IRRESPECTIVE OF OTHER CONSIDERATIONS, ARE NOT ENTITLED TO PROTECTION IN THE SECURITY THEY RECEIVED.

The allegations of the bill admitted by the demurrers show that the appellees holding the preferential chattel mortgages were in no sense diligent creditors. The transaction resulting in their preference was, so far as they are concerned, a voluntary distribution of security by an insolvent debtor, not only on the eve of, but in the very act of, a general assignment for the benefit of creditors. In

the division of the assets of an insolvent, equity delights in equality, yet to the vigilant creditor preference is bestowed as the reward of active diligence.

Blennerhassett v. *Sherman*, 105 U. S. 100, 117:

"The vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interest."

It is not otherwise in Ohio.

Fassett v. *Traber*, 20 Ohio, 540, 545:

"A creditor has a right to secure himself."

Doremus v. *O'Hara*, 1 Ohio St. 45, 49:

"The principle of permitting a creditor to reap the advantage of his vigilance in securing his claim against a failing debtor."

Harkrader v. *Leiby*, 4 Ohio St. 602:

"The statute permits every creditor of an insolvent debtor to reap the reward of his diligence."

The preferred creditors in the case at bar, being without diligence, should not be favored, or their chattel mortgages upheld.

III.

THE CHATTEL MORTGAGES ARE PREFERENCES WITHIN THE INHIBITION OF SECTION 6343 OF THE REVISED STATUTES OF OHIO.

The admitted allegations of the bill also show that these preferential mortgages were on the same property

included in the deed of assignment, and were part of one and the same transaction with the assignment; that the assignment was in trust to John R. Sayler; that it, including the mortgages, was made in contemplation of insolvency; and that the same was with intent then and thereby to prefer the appellees, Simpson, McGroarty, Gault, and Fitch.

We disclaim any intention to impeach the transaction in controversy, as one made with intent to hinder, delay, or defraud creditors. Such a case is provided for by section 6344 of the Revised Statutes of Ohio, and is quite distinct from the claim we are presenting.

The claim we make is, that the transaction shown by the bill is within the operation of section 6343 of the Revised Statutes, and that therefore the attempted preferences should be decreed to inure to the benefit of the general creditors.

Section 6343 is as follows:

"All assignments in trust to a trustee or trustees made in contemplation of insolvency with intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

The original act, from which this section in the revision is taken, word for word, is found in O. L., 56 v. 231, 235, and is section 16 of an act entitled, "An Act Regulating the Mode of Administering Assignments in Trust for the Benefit of Creditors." And section 16, which is the section under consideration, has opposite it the marginal explanation, "Assignments in Contemplation of Insolvency to inure to the Benefit of all Creditors."

This law took away the right to prefer creditors in assignments which had before existed in Ohio.

Stevenson v. *Agry*, 7 Ohio (2d part), 247.
Atkinson v. *Tomlinson*, 1 Ohio St. 237.
Bagaley v. *Waters*, 7 Ohio St. 359.
Hoffman v. *Mackall*, 6 Ohio St. 124, 136.

And converted such assignments with preferences into assignments for the benefit of all creditors.

If the transaction in question had been in the form of a single paper, containing within its four corners both the assignment in trust to Sayler, and the intent to prefer the appellees, it would have been clearly within the inhibition of the statute. The contention of appellees' counsel, however, is, that by the adoption of the device of putting the preferences in one instrument, and the assignment to Sayler in another instrument, the statute has not been violated, but only evaded. The argument in that behalf being, that assignments in trust in contemplation of insolvency with intent to prefer creditors, are not within the inhibition of the statute, unless the same be in the form of a single instrument.

This will not do, we submit. The statute is a remedial one, and can not be thus successfully evaded. Obviously our bill shows an assignment in trust in contemplation of insolvency with intent to prefer, not, however, by means of a single instrument or paper. If the mortgages may not be regarded in law, as they are in fact, to be part of the same act or transaction with the deed of assignment, and so intended, then we have not shown a case within the operation of the statute. How, then, is this statute to be construed? If liberally, and to suppress the mischief and to advance the remedy, then the interpretation claimed for it by the appellees, making its evasion easy, can not be

maintained. The statute is obviously remedial in its character.

See the construction of section 6344, in *pari materia* with section 6343.

Bloomingdale v. *Stein*, 42 Ohio St. 168.

Remedial statutes in Ohio receive a liberal construction.

As was said in Heyden's case, 3 Rep. 7:

"The office of all the judges is always to make such a construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*."

And this case is approved, and the very language quoted is adopted by the Supreme Court of Ohio, in the case of *Burdgett* v. *Burdgett*, 1 Ohio, 469, 481.

Moreover, the Supreme Court of Ohio have expressly decided that this very statute (6343) should receive a liberal construction.

Harkrader v. *Leiby*, 4 Ohio St. 602, 610-11:

"This statute (6343) is of the most beneficial character, and the uniform language of the court has been that it ought to receive a most liberal construction. It promotes justice and equity by compelling an equal distribution of the effects of an insolvent debtor among those equally entitled. . . . If, then, the mischief to be suppressed was the power that insolvent debtors before had of directing the application of trust funds created by them so as to secure preferences among their creditors, how can it make any difference in what manner the fund is created? To give it such a construction (there being a literal construction claimed for it in the case then under consid-

eration), is to suppose the legislature absurdly attempting to suppress a mischief in one form, and leaving another, equally convenient and effectual, in which it might, with impunity, be accomplished."

Justice v. *Uhl*, 10 Ohio St. 170, 177:

"Undoubtedly, the effect and operation of the statute (6343) is not to be avoided by the form of assignment the parties may choose to adopt."

The bill shows a fraud upon the law and an attempted evasion of it. This is a violation of the law, though not within the letter.

Blennerhassett v. *Sherman*, 105 U. S. 100.

Lee v. *Lee*, 8 Peters, 44.

Downing v. *Kintzing*, 2 Serg. & R. 326.

Sharp v. *Harrison*, 6 Bing. 416.

Doe v. *Carter*, 8 T. R. 300.

Maxwell on Statutes, p. 133, ch. 4: "Construction to Prevent Evasion."

It has been repeatedly held that two instruments, if in fact executed and intended as parts of one transaction, may be so regarded in law, and as such within the operation of statutes to which, as separate instruments, in form, they would not be obnoxious.

White v. *Kautzhausen*, Supreme Court of the United States, January 28, 1889, not yet published, upholding the doctrine laid down in *Preston* v. *Spaulding*, 120 Ill. 208, and in *Field* v. *Geoghegan*, 125 Ill. 70.

In which the language is used: "Courts of equity are not to be misled by mere devices nor baffled by mere forms."

Van Patton v. *Burr*, 52 Iowa, 518.
Moore v. *Church*, 70 Iowa, 208.
Holt v. *Bancroft*, 30 Alabama, 193.
Berry v. *Cutts*, 42 Maine, 445.
Clapp v. *Nordmeyer*, 25 Fed. Rep. 71.

A decision by Judge Brewer, of the United States Circuit Court for the Southern District of Missouri, concurred in by Mr. Justice Miller.

Doggett v. *Herrman*, 16 Fed. Rep. 812, by Judge McCrary.
Livermore v. *McNair*, 34 N. J. Eq. 478.
Hahn v. *Salmon*, 20 Fed. Rep. 801.
Kellogg v. *Root*, 23 Fed. Rep. 525.
Root v. *Potter*, 59 Mich. 498.
Winner v. *Hoyt*, 66 Wis. 227.
Preston v. *Spalding*, 120 Ill. 208 (mentioned *supra*).

A case in which Chief-Justice Fuller successfully presented, on behalf of the unsecured creditors, the claim we make upon behalf of appellants in this case.

Field v. *Geoghegan*, 125 Ill. 70 (mentioned *supra*).

The Supreme Court of Ohio has never had before it this question shown by the bill in the case at bar; and the only decisions of such a case that we have found reported, are one against our contention, 15 Weekly Law Bull. 8 (January, 1886), by the General Term of the Superior Court in Cincinnati, in the case of *The Merchants' National Bank* v. *Rouse*, trustee. The other in favor of our contention reported in No. 7, of Vol. 21, of the Weekly Law Bull., at p. 513 (February, 1889), by the Franklin County Circuit Court, in the case of *The Commercial National Bank, of Columbus*, v. *The Cincinnati National Bank*. Both

these decisions being by intermediate appellate courts of equal dignity.

IV.

THE PREFERENTIAL CHATTEL MORTGAGES ARE INVALID FOR THE FURTHER REASON THAT THEY WERE MADE BY AN INSOLVENT CORPORATION AFTER IT HAD DETERMINED TO QUIT BUSINESS AND SURRENDER ITS PROPERTY TO AN ASSIGNEE FOR THE BENEFIT OF CREDITS.

We next desire to present the question of the validity of the preferential chattel mortgages, by reason of the fact that they were made by a corporation. The question is presented in two aspects: First, as to the power, generally, of a corporation when it has become insolvent, and has determined to stop business, and surrender its property to an assignee for the benefit of creditors, to prefer at all. And, second, as to the power of directors to prefer themselves.

In the event of insolvency, the fiduciary relation which the directors formerly occupied toward the stockholders is transferred to the creditors of the corporation. They thereupon become trustees for the benefit of the creditors of the corporation, and, as such, owe duty to all creditors alike. They have no power to discriminate between creditors according to their own whim or caprice.

Our contention in this matter, does not at all interfere with the right of the directors and managing officers of a corporation to give security, in the regular course of business, or to pay or secure a creditor who is pressing for payment, or to do any other thing that may be needful to carry on and effectuate the object for which the corporation was organized. The doctrine has nothing to do with the life

of a corporation. It becomes operative only when the corporation has reached the point where its directors have concluded to put the corporation into liquidation.

The court need not be reminded of the strong temptation to abuse the power of preference under such circumstances, and the history of corporate enterprises in this country affords no warrant for indulging any implication of such a power.

The first reported case in this country recognizing the power of an insolvent corporation to prefer is that of *Catlin* v. *The Eagle Bank of New Haven*, 6 Conn. 233. In that case, the court contended that the stockholders were the only persons who could complain of a breach of trust on the part of the directors, and broadly lay down the proposition that the directors owe no duty to creditors.

Such an idea of corporate responsibility has long since been overthrown. The right of creditors to pursue misapplied corporate assets, which the Supreme Court of Errors of Connecticut denied, was shortly thereafter held to be the law in the leading case of *Wood* v. *Dummer*, 3 Mason, 309, decided by Mr. Justice Story, and has been frequently recognized and applied by this court.

Curran v. *Arkansas*, 15 How. 304.
Mumma v. *Potomac Co.*, 8 Pet. 281.
Barings v. *Dabney*, 19 Wall. 1.
Broughton v. *Pensacola*, 93 U. S. 266.

The doctrine of permitting a corporation to give preferences, after it has become insolvent and determined to quit business, has been declared, by the best text writers upon the law of corporations, to be wholly indefensible on principle, and to be contrary to the plainest principles of justice. The subject is so fully discussed by these text

writers, that we will content ourselves by referring the court to such discussion.

2 Morawetz on Private Corporations, §§ 803, 861–868.
Wait on Insolvent Corporations, §§ 162, 654.
Taylor on Private Corporations (2d ed.), § 668.

This case, also, pushes the doctrine of corporation preferences to the extreme of permitting a director, by such preferences, to secure an advantage to himself. C. J. O'Hara, one of the directors of the company, and the treasurer, who executed the chattel mortgages with the president, was the indorser upon one of the notes secured by the chattel mortgage to Robert Simpson, and by securing the payment of the note by the corporation, relieved himself of liability upon such note.

The great weight of authority, we submit, is against the power of directors to use their position to their own advantage in this way.

2 Morawetz on Private Corporations, § 787.
Taylor on Private Corporations, § 759.
Koehler v. *Black River Falls Iron Co.*, 2 Black, 715.
Bradley v. *Farwell*, 1 Holmes, 433.
Adams v. *Kehlor Milling Co.*, 35 Fed. Rep. 433.
S. C., on rehearing, 36 Fed. Rep. 212.
Lippincott v. *Shaw Carriage Co.*, 25 Fed. Rep. 577.
Corbett v. *Woodward*, 5 Sawyer, 403.
Stout v. *Yeager Milling Co.*, 13 Fed. Rep. 802.
Coons v. *Tome*, 9 Fed. Rep. 532.
Richards v. *N. Hampshire Ins. Co.*, 43 N. H. 263.
Haywood v. *Lincoln Lumber Co.*, 64 Wis. 639.

For the foregoing reasons, appellants ask that the decree below, dismissing the bill, be reversed.

JOSEPH WILBY,
J. C. HARPER.

Robert Clarke & Co., Printers.] [*March, 1889.*

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Supreme Court of the United States.

OCTOBER TERM, 1888.

The George T. Smith Middlings Purifier Company, and W. and F. Livingston,

Appellants.

vs.

Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, Robert Simpson, John R. Sayler, assignee of The Simpson & Gault Manufacturing Company, and The Simpson & Gault Manufacturing Company,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR APPELLEES.

THOS. McDOUGALL,
AVERY & HOLMES,
For Appellees.

THOS. McDOUGALL,
Of Counsel.

Robert Clarke & Co., Printers.] [March, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

The George T. Smith Middlings Purifier Company, and W. and F. Livingston,

Appellants.

No. 249.] *vs.*

Mary S. J. McGroarty, Lucy D. Gault, Mary T. Fitch, and Robert Simpson, and John R. Sayler, assignee of The Simpson & Gault Manufacturing Company,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEES.

Appellants are general unsecured creditors of The Simpson & Gault Manufacturing Co., which is a corporation created under the laws of Ohio, and a citizen of that state.

On the 25th day of May, 1885, that corporation being insolvent, executed a deed of assignment to one John R. Sayler, of all its property for the benefit of creditors, and on the same day the deed of assignment was filed in the Probate Court of Hamilton county, Ohio, which court, under the laws of Ohio, has exclusive jurisdiction of the administration of the assets of insolvents.

The bill alleges (Record, page 5) that in due course of the administration of his trust, as assignee, as aforesaid, the said John R. Sayler had sold and converted into money, which he now holds, all and singular, the property described in the mortgages hereinafter referred to, and the deed of assignment. On the twenty-third day of May, 1885, two days prior to the execution and delivery of the deed of assignment, the Simpson & Gault Manufacturing Company executed and delivered to the appellees five mortgages. These mortgages were given to secure *bona fide* existing indebtedness owing by the corporation to the mortgagees. The validity of the indebtedness is not questioned in the case at bar. These mortgages were duly entered of record on the twenty-third day of May, 1885, and were on record two days prior to the execution of the deed of assignment, and its delivery to the Probate Court, as aforesaid.

It is claimed by appellants that the mortgages are not valid mortgages, and should be set aside, because it is alleged that at the time the mortgages were executed, the corporation mortgagor was insolvent, and contemplated and intended to make a general assignment of all its property to said Sayler in trust, as aforesaid, and after it had resolved and decided to make such assignment, and commit such act of insolvency; and, thereupon, at the same time, and as a part of the same act or transaction, with intent to prefer the mortgagees named, executed the chattel mortgages, whose validity as preferences, it is claimed, can not be upheld under section 6343 of the Revised Statutes of Ohio.

Appellants having made demand upon the said Sayler, as assignee, to bring suit against the mortgagees on behalf of the general creditors of the corporation, to have said

mortgages to appellees declared to be fraudulent and void, as against the general creditors, and to secure for the equal benefit of all the creditors of the corporation, the proceeds arising from the sale of the property in said mortgages described, and said Sayler having failed and refused to comply with the said demand, and having refused to bring such suit for that purpose, as did also the directors of the corporation, upon whom like demand had been made, this suit was brought.

To the bill demurrers were filed on the following grounds: First, because of multifariousness. Second, because all questions touching the validity of the mortgages, and the distribution of the funds arising from the sale of the mortgaged property, were at the time of the filing of said bill in the Circuit Court, and had been long prior thereto, within the exclusive jurisdiction, and control of the Probate Court of Hamilton county, State of Ohio, in which court, and to which proceeding the complainants are parties, and are also represented by the said trustee, John R. Sayler. Third, because the bill did not set forth matters sufficient to entitle appellants to the relief sought, or any relief in equity.

The demurrers were sustained, and the bill dismissed, and the case is now here on appeal from the judgment of the Circuit Court in dismissing the bill.

ARGUMENT.

I.

The first question presented by the record is, the jurisdiction of the Circuit Court to entertain the bill.

The bill sets forth that all of the respondents are citi-

zens of the State of Ohio, and the complainants citizens of other states.

The corporation which executed the deed of assignment and the mortgages, is an Ohio corporation and citizen, and John R. Sayler, trustee for all of the creditors, is an Ohio citizen.

The Supreme Court of Ohio has decided, in *Haynes* v. *Tiffany*, 25 Ohio St. 549, that the assignee for the benefit of creditors is the representative of the complainants, and through him their rights must be worked out.

The entire assets were conveyed to Sayler, as assignee. The title to them is in him, as such assignee, and the rights of the complainants, as creditors, must be worked out through him, as assignee. The case is, therefore, one in which the complainants do not have a separable controversy from the other creditors of the corporation, and the assignee in trust for the benefit of creditors; and, therefore, on the ground of citizenship, the Circuit Court had not jurisdiction.

The mere refusal of Sayler, the assignee, to bring suit did not confer jurisdiction on the Circuit Court, as the remedy for the creditor, in the event of the assignee's refusal to proceed, was an application to the court having control of him, as its officer, to compel him to proceed, and, on failure to do so, to remove him, and substitute an assignee who would.

This has been decided in *Glenny* v. *Langdon*, 98 U. S. 20; *Trimble* v. *Woodhead*, 102 U. S. 642.

It can not be claimed that John R. Sayler, as assignee for the benefit of creditors, could have maintained this suit in the federal court. He is a citizen of Ohio; the corporation of which he is assignee is a citizen of Ohio; and the appellees, the validity of whose mortgages is the subject of

the suit, are also citizens of Ohio. How, then, could an unsecured creditor of the estate, residing in another state, who must work out his rights in and through his assignee, in whom is the title to the assets, confer jurisdiction on the federal court, when the assignee himself could not bring the suit? The controversy is one common to all the creditors; complainants have not a separable controversy from that of the assignee and the other creditors. It is clear, therefore, that, on the ground of the citizenship of the real parties in interest, this suit could not be maintained, and the demurrers were properly sustained.

II.

JURISDICTION OF THE SUBJECT-MATTER.

It is admitted by the bill that the deed of assignment was, on the 25th day of May, 1885, filed in the Probate Court of Hamilton county, under the Revised Statutes of Ohio, sections 6335 to 6358, inclusive. These sections confer jurisdiction on the Probate Court, in the administration of such assignments; and, pursuant to the authority vested in that court, the assignee had proceeded to sell—and had sold—the property, prior to the filing of the bill by appellants in the Circuit Court; and that, at the time the bill was filed, the assignee held in his hands the proceeds of the sale of the property covered by the mortgages and the deed of assignment, for administration, subject to the orders of the Probate Court on distribution. But it was contended, on the argument below, that the Probate Court had no jurisdiction to determine the validity of the mortgages; that its jurisdiction was limited; and that, in the absence of a statute conferring upon it equity powers, it

could not inquire into the validity of the mortgages in the case at bar, and could not determine the rights of the parties, as asserted in the bill.

The Supreme Court of Ohio, in a recent case, has held otherwise (*Sayler* v. *Simpson*, 45 Ohio St. 141). That case was one involving the chattel mortgages now before this court. And the contention, on the part of counsel for appellants in that case, was that the Probate Court was without jurisdiction. The syllabus of the case is as follows:

"Where, after chattel mortgages, given to secure separate indebtedness due each of several creditors, had been filed with the proper officer, the mortgagor assigned all his property for the benefit of creditors, and the assignee, having possession thereof, sold the mortgaged property, under the order of the Probate Court, in the administration of such assignment, and has the proceeds for distribution, the liens of the several mortgages are transferred from the property to the fund, and attach thereto, in the order of their priority on the property; and the rights of such mortgages to the fund must be worked out through the Probate Court.

2. On application to that court by the mortgagees, for the payment of their mortgages out of such fund, the unsecured creditors of the assignor may intervene, and contest their right to such payment.

3. In such proceeding, the Probate Court has jurisdiction to order the payment of such liens by the assignee, out of such fund, according to their priority; and may, in the exercise of such jurisdiction, decide upon the validity of the mortgages, and determine to what extent, and in what order of priority, they are entitled to be so paid.

4. From such order, decision, and judgment of the Probate Court, appeals may be taken to the Court of Common Pleas, and the cause so appealed must therein be tried, heard, and determined as though the court had original jurisdiction thereof."

On page 149, the court say:

"The insolvent debtors' statute contemplates that the

creditors, who desire to share in the estate assigned, shall authenticate and file their claims with the assignee. These are reported to the court by him. Mortgagees whose mortgages include any of the assigned property sold by the assignee must work out their rights in the fund through the Probate Court. They all thus become parties to the proceeding. The unsecured creditors are parties in interest adverse to such mortgage claimants; and, although the assignee may defend in their behalf, there is no good reason why they may not themselves do so."

The Probate Court having jurisdiction of the trust fund and the validity and priority of all liens thereon, and having acquired jurisdiction of the estate prior to any proceeding by appellants in the Circuit Court, and being in the actual administration of the estate, we submit that the Circuit Court could not thereafter assume jurisdiction and determine the validity of liens on a fund which was then in the possession and control of another court of competent jurisdiction.

And as these facts appear by the bill itself, it seems clear to us that the demurrers below were properly sustained. We do not consider it out of place to say that the Probate Court has passed on the validity of the mortgages in this case, and has ordered the fund distributed to the mortgagees, thereby sustaining the validity of the mortgages. From that decision an appeal was taken to the Court of Common Pleas, which affirmed the judgment of the Probate Court, and error was taken from the Common Pleas to the Circuit Court of Hamilton County, where the judgments of the Common Pleas and Probate Courts were affirmed, and that the case is now pending in the Supreme Court of Ohio, on error from the Circuit Court, and has been argued and submitted.

This court, we presume, will follow the decisions of the Supreme Court of Ohio in construing state statutes.

And the court having decided, under the insolvent debtors' act, that the Probate Court has jurisdiction to determine the validity of these mortgages, and having held that mortgagees and creditors must work out their rights to the fund through the Probate Court, and are all parties to the proceedings, this court will not hold otherwise, and determine on the case presented by this bill that the Circuit Court of the United States had the right to pass on the validity of these mortgages.

In view of the full discussion of the jurisdiction of the Probate Court in the case of *Sayler* v. *Simpson*, *supra*, we do not deem any further argument necessary on the proposition that the Circuit Court below was without jurisdiction of the subject-matter, and that on that ground the demurrers to the bill were properly sustained.

III.

POWERS OF INSOLVENT CORPORATIONS TO PREFER CREDITORS.

Has an insolvent corporation power to prefer one creditor to another, the same as a private individual, in Ohio? That an individual may prefer his creditors, even though insolvent, by executing mortgages, is settled in Ohio, is now a rule of property, and is no longer a subject for argument. The fact that the question now raised in this case has never been heretofore raised in Ohio; and that the courts have, for a period of more than thirty years, administered the assets of the various insolvent estates of individuals and corporations which have assigned in that state, and all preferences created by them, on the same basis, and according to the same rules, and have always upheld preferences similar to those at bar, would seem, under the holdings of

the Supreme Court of Ohio, in other cases, to have established a rule of property which this court will not disturb.

The rule on this subject is to be found in *Arrowsmith* v. *Harmoning*, 42 Ohio St. 254. On page 261, the court, speaking of the case of *Mauarr* v. *Parrish*, 26 Ohio St. 636, say:

"1. *Mauarr* v. *Parrish* has become a rule of property. A decision having attained that importance should never be disturbed, unless it violates fundamental principles, or is not only plainly wrong, but mischievous in its consequences. *Kernay* v. *Buttles*, 1 Ohio St. 362; *Gray* v. *Askew*, 3 Ohio, 466, 478; *Sellers* v. *Corwin*, 5 Ohio, 398, 408; *Kinsman* v. *Loomis*, 11 Ohio, 475, 479; *White* v. *Denman*, 1 Ohio St. 110, 115; *Corwin* v. *Benham*, 2 Ohio St. 36, 44; *Crumbaugh* v. *Kugler*, 2 Ohio St. 373, 380; *Strong* v. *Beach*, 11 Ohio St. 283, 288; *Knox Co.* v. *Nichols*, 14 Ohio St. 260, 269; *Day* v. *Munson*, 14 Ohio St. 488, 492; and *Mauarr* v. *Parrish*, is not within any such exception to the rule."

We can not find, on an examination of the laws of Ohio, that there is any distinction made between a private individual and a corporation in the matter of assignments, and power and right to prefer creditors. The right of an insolvent corporation to make an assignment for the benefit of creditors, and to prefer specific creditors, even though the entire property be conveyed to a single creditor to the same extent that an individual may prefer, has been decided in the States of New York, Pennsylvania, Illinois, Virginia, Iowa, New Jersey, Connecticut, Arkansas, and other states. The holdings of the courts of last resort in these states have been uniform, that the right of the corporation, in the absence of statutory inhibition, is co-extensive with that of the right of individuals in the creation of preferences. See

Coates v. *Donnell*, 94 N. Y. 168.

Dana v. *Bank of United States*, 5 W. & S. (Pa.) 223.
Rechwald v. *Commercial Hotel Co.*, 106 Ill. 439.
Planters' Bank v. *Whittle*, 78 Va. 737.
Buell v. *Buckingham*, 16 Ia. 284.
Catlin v. *Eagle Bank*, 6 Conn. 233.
Ringo v. *Biscoe*, 13 Ark. 563.
Wilkinson v. *Baneule*, 41 N. J. Eq. 635.
Bergen v. *Porpoise Fishing Co.*, 42 N. J. Eq. 397.

The last case cited, that of *Bergen* v. *Porpoise Fishing Co.*, has a very full discussion of this doctrine, and upheld the preferences, although the parties preferred were stockholders and directors. The only question being, was the debt secured *bona fide?*

These authorities, without further argument, would seem to settle this question, and, to use the language of the Court of Appeals in New York, in the case of *Coates* v. *Donnell*, *supra*,

> "In the absence of statute a corporation has the same right to prefer that a private individual has, even though the corporation may be insolvent."

The argument made against these decisions by appellants is, that the officers of the corporation are trustees for all the creditors, and the assets, from the date of insolvency, are trust funds in their hands, to be distributed equally among the creditors, which they can not divert from this equal distribution by creating preferences.

In the case of an individual debtor who is insolvent, that insolvency does not prevent the assets from being applied by him to the payment of his debts, even though they are exhausted in the payment of one creditor to the exclusion of all others.

In other words, the statement that the assets can not be diverted from the payment of the just debts of the insolvent debtor or corporation, is consistent with the application by the insolvent individual or corporation in the payment of any debt in preference to other debts.

An examination of the cases cited by counsel for appellants, will show that the language of the courts on this subject, that assets of the insolvent corporation are trust funds for the payment of its debts, was used in every instance where the funds were being applied or had been applied in the payment of other than the debts of the corporation. And we can find no adjudicated case sustaining the doctrine that an insolvent corporation may not apply its assets to the payment of its just debts, even though it should apply them to prefer one creditor to the exclusion of another or all the other creditors. There being no statutory prohibition in Ohio against corporations making preferences, any more than there is against individuals making preferences, and the preferences, in the case at bar, being made to secure valid and existing indebtedness of the corporation, we fail to see how the validity of the mortgages can be questioned on the ground that a corporation under the laws of Ohio, can not, when insolvent, prefer its creditors.

Part of the brief of appellants is occupied in the discussion of a proposition which we think is so well settled under the authorities as not to warrant extended argument. That proposition is, that the assets of an insolvent corporation are a trust fund, so that after it has ceased to do business and determined upon making a general assignment for the benefit of creditors, it can prefer no creditor.

Appellants cite a number of cases, and particularly

the case of *Robbins* v. *Embry*, 1 S. & M. Ch. 207, to sustain this proposition. That case may have decided what the appellants desire to have decided in this case. We desire to say to the court, however, that it was expressly overruled in the case of *Arthur* v. *Commercial Railroad Bank of Vicksburg*, 9 S. & M. 395, and we call the court's attention especially to the second paragraph of the syllabus of that case. In that case, the court of last resort of Mississippi said that it brought before it the case of *Robbins* v. *Embry*, and held that the assets of the insolvent corporation were no more a trust fund than were the assets of an insolvent individual, and that the corporation could prefer as well as the individual.

The language of the court is as follows:

"It is now settled that a bank may make an assignment of its effects for the payment of its debts. Such assignments, whether made voluntarily or by operation of law, have often been upheld. . . . The objection on this part of the case, however, is that the assets of a bank constitute a trust fund for the payment of all its debts, and that no disposition can be made of this trust fund, but only that which secures equality among the creditors; in other words, that no priorities or preferences can be given.

In one sense, the assets of a bank do constitute a trust fund, for they can not be lawfully diverted from the payment of debts; yet no creditor, unless he have a judgment, has such an interest in them, apart from an assignment, as will enable him to subject them to his debt. A particular assignment may be made of part of the effects to pay a specified debt. Payment may be made to a single creditor, though such payment may exhaust the fund. These preferences could not be given if any indefinite trust attached to the assets in favor of all the creditors. A preference given by a general assignment does not, therefore, of necessity, invalidate the deed; yet all such preferences are liable to objection, and must be watched with jealousy. Though they may create suspicion, they are not in themselves fraudulent."

This doctrine, we have said, is elementary. In Morawitz on Corporations, § 582, it is said:

"However, it is generally considered to be a settled rule of law, that a corporation has the same power to make preferences amongst its creditors that an individual has, and an assignment of all the assets of a corporation to a trustee, to pay certain creditors in full, leaving the others unpaid, will apparently be sustained both at law and in equity. In *Ringo* v. *Biscoe*, Chief Justice Watkins said: 'It is now well settled that a corporation, unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, by virtue of its general power to contract, may well make an assignment of its effects, entire or partial, if made *bona fide* for the payment of its debts, the same as any natural person may do, and the corporation has the same right to make preferences among its creditors of particular creditors or classes of creditors, and such preferences, when they are meritorious, so far from furnishing an argument against the deed, conduce rather to uphold it.'"

IV.

THE ONE-TRANSACTION THEORY.

It is claimed that the corporation, being insolvent at the time it executed the mortgages, and having decided to make a general assignment for the benefit of its creditors, and subsequently or at the same time determined to execute the mortgages in question, that the deed of assignment and the execution of the mortgages are one instrument, although the mortgages were in fact executed and delivered and filed for record on the 23d of May, and the deed of assignment was not executed and filed until the 25th of May; yet, as it is claimed that it was present in the mind of the corporation at the time it executed the mortgages to make a deed of assignment, this purpose

being present, the mortgages and deed of assignment are all one and the same transaction, and have the same effect as if the mortgages had been specifically set out in the deed of assignment and made a part thereof.

We have been unable to appreciate the ingenuity that is able to reach such a conclusion, and give it the character and effect of a rule of property.

We submit that the simple question is one of priority between two contending mortgagees. The deed of assignment for the benefit of creditors is in substance and effect a mortgage security. It is the conveyance of the property to the assignee for certain purposes. The chattel mortgages in question are of like character. It is admitted that the instruments were executed by the corporation, and recorded as heretofore stated. It is further conceded, that the debts secured by the chattel mortgage are valid, and, in the absence of fraud, the single question of priority is to be determined by the date of record. Priority in right in such a case is to be determined by priority in time as appears by the record.

The law of Ohio, as construed by its Supreme Court, has fixed as a rule of property that mortgages take effect from the time of their delivery to the recorder.

Magee v. *Beatty*, 8 Ohio, 396.
Stansell v. *Roberts*, 13 Ohio, 148.
Mayham v. *Coombs*, 14 Ohio, 428.
White v. *Denman*, 1 Ohio St. 110.

The claim made by the appellants that this rule of property is to be set aside by what was present in the mind of the mortgagor at the time that he executed his mortgage, is to substitute mental processes as a rule of property for executed instruments and their record. If

we understand the claim that is made by appellants on this one transaction or one instrument theory, it is this. An insolvent debtor having, as it is conceded, the right to prefer one creditor to another when insolvent, renders the preference void and of no value to the creditor if, at the time he executes the instrument, there is in his own mind a purpose to make an assignment for the benefit of creditors. That is to say, if A, being insolvent, and desirous of preferring B, to whom he is indebted, sends for B and executes to B a mortgage to secure the debt he owes B, that mortgage is valid in the hands of B, provided A had not, at the time he executed it, a purpose to make an assignment for the benefit of creditors; and that mortgage is valid, even though immediately on its execution and delivery to B, he then forms a purpose to make an assignment, and does in fact, within the next hour, make a deed of assignment, and the mortgage executed to B and the deed of assignment are recorded within a moment of each other. But if A, at the time he executed the mortgage to B, had a purpose in his mind to execute, for the benefit of creditors, a deed of assignment, then, even although he does not communicate that purpose to B, the mortgage to B is invalid, and it is all a part of one transaction, even though the deed of assignment is executed six months after the mortgage.

If it is claimed, however, that the purpose existing in the mind of the insolvent debtor at the time he executes the mortgage creating the preference does not determine the validity and the one-transaction character of the mortgage and deed of assignment, but only the communication of the purpose to assign to the creditor receiving the mortgage, then we have established as a rule of property, not the mental processes or purposes of the insolvent debtor at

the time he executes this instrument, but the communication of those purposes or processes to the party receiving the mortgage, who has no control over the mental processes or purposes or their communication. This seems an extraordinary basis on which to rest a rule of property. The Supreme Court of Ohio having held in a number of cases under the laws of Ohio that an insolvent debtor, with knowledge of his insolvency, may execute a mortgage and prefer any creditor to the exclusion of all other creditors, by conveying to the creditor preferred, the debtor's entire property, and having determined that mortgages and deeds take effect only from the time of their delivery for record, it is now asked to establish as a rule of property, that an insolvent debtor can not make a preference where there is in his mind a purpose to make an assignment for the benefit of creditors. This is in effect to say that he can not prefer any creditor. It is to leave it in the power of the insolvent debtor, by the failure to disclose, or the disclosure of his mental purposes, to determine the validity of the security given to the creditor, who has no control of any kind over the mental processes and purposes of the insolvent debtor giving him the security.

In the construction given to section 6343 by the Supreme Court of Ohio since it overruled *Mitchell* v. *Gazzam*, 12 Ohio, 315, it has been held, to use its language in *Doremus* v. *O'Hara*, 1 Ohio St., on page 50:

> "That the plain and obvious intent of the law was only to apply to those cases where a person receiving the assignment could be considered as standing in some relation as a trustee, either in terms or by fair implication, other than that which the mere taking of security for his debt would create."

Thus holding that it was the agreement, intent, and purpose of the creditor receiving the preference at the

time it was given that determined its character, and not the mental processes, purposes, or intent of the debtor giving the preference.

In *Mitchell* v. *Gazzam*, *supra*, on page 336, we find this language:

"It is the motive, design, and situation of the assignor, and not the motives of the assignee, that give character to the assignment, and bring it within the operation of the statute."

It was the holding in this case of *Mitchell* v. *Gazzam*, that was overruled in *Atkinson* v. *Tomlinson*, 1 Ohio St. 237, and which led the Supreme Court in that case to limit the operation of the statute, as was expressed in *Bagaley* v. *Waters*, 7 Ohio St. 359, in which case, speaking of section 6343, on page 364, the court say:

"But it does not seek to prevent the debtor from applying his property to the payment in full of the *bona fide* claims of one or more creditors, though nothing be left for the satisfaction of other claims equally meritorious. One creditor may be amply secured by a mortgage, though the debtor have no means from which to pay or secure others. But there is one mode in which a debtor is not permitted, in contemplation of insolvency, to exercise this conceded right of preference. The sole object of the statute is to prevent his effecting this purpose by an assignment in trust. . . .

In the case before us, it is not charged that the contract of sale set out in the petition was merely colorable; no secret trust is claimed to exist, nor any agreement touching the subject-matter to have been made between the parties other than the written contract. The question, then, is upon the proper construction and legal effect of this contract."

Again, on page 367:

"There are no stipulations in the contract which give to any of the creditors of the vendor or reserve for him-

self any interest in the property transferred to the vendee. It purports to be an absolute sale, and it is not claimed to have been otherwise intended by the parties. The amount and terms of the purchase-money are subject to no defense."

The construction in the case at bar sought to be given to the statute of Ohio in order to uphold this one-transaction theory, is subject to the remark made by the Supreme Court of Ohio in *Doremus* v. *O'Hara*, *supra*:

"In this view of the case, we do not feel authorized to give any strained construction to the statute, although such construction might tend to promote equality among creditors."

And a like remark is made in *Bagaley* v. *Waters*, *supra*, on page 369:

"But, in a case like the present, however much we might desire to enforce equality of rights among creditors, we are not at liberty to accomplish this object by giving a construction to the statute which is wholly unwarranted by its terms."

So that it seems clear, under the decisions of the Supreme Court of Ohio, that not the mental processes and purposes of the insolvent debtor are to be taken as the basis of determining the character of the preference given and the instrument executed, but the existence of the trust for others, and the creation of a contract relation toward others, which would be recognized at law and enforced in equity.

The only fact set up in the bill of appellants claimed to support this one-transaction theory is, that, at the time the corporation resolved to give the mortgages and thereby created the preferences in this case, it had determined to make a deed of assignment for the benefit of its creditors, although no formal resolution to that effect by its directors

had been passed, and the statement in the pleading that this was all one transaction and formed part of a single plan and purpose for the disposition of the assets of the corporation, is a legal conclusion drawn by the pleader, from the giving of the mortgages and the alleged purpose of the corporation to execute a deed of assignment. There is no allegation in the bill that an agreement was made between the creditors and the corporation debtor that they should form a part of one and the same transaction, or that the creditors assented to or intended to be bound by any such agreement. The only averment of fact is the statement of the purpose and intention of the corporation, which, as we have found, under the construction given to section 6343 by the Supreme Court of Ohio, is not what determines whether the creditor secured is a trustee and the instrument he receives is an assignment in trust, but it is the agreement on which the creditor takes the same. Does he hold for others besides himself, and is there a secret trust engrafted on or a part of the instrument by which he took the preference?

How then, can it be claimed that the mortgages and the deed of assignment are one and the same instrument, contract, and conveyance? How can it be said that it was the purpose, intent and agreement, to make them one instrument in effect, in substance, in intention? To so hold is to give them a construction expressly contradictory of their terms, and the intent of the parties. In what sense can it be held that John R. Sayler is the trustee for these mortgagees, and that he agreed to become such trustee, and it was intended to make him such, when this was the very thing the parties sought to avoid, and which the conveyances expressly negative? That he took possession of the property covered by the mortgages is true. But that

possession was taken in the right of the mortgagor, and not in the right of the mortgagees. If possession or right to possession determines it to be one transaction, then every mortgage will be a trust, where the mortgagor is left in possession.

For whom and how are these chattel mortgagees trustees? Who can compel them to account? Whose debts, other than their own, did their mortgages secure? How is it possible to make them a part of the deed of assignment, and thus create a contract, make a law by judicial fiat, which divests vested rights, and violates the intent and contract of the parties, a contract they were authorized to make.

This mental process, and one-transaction theory, also destroys the well settled rules of property affecting the priority of mortgages. It involves us in the very difficulties which the passage of the law of Ohio touching the priority of mortgages, and its construction by the Supreme Court of that state, sought to avoid. It makes not the time of record, nor the form of the instrument, nor the character of the debt, nor the contract between the debtor and creditor, but what was in the mind of the mortgagor at the time he made his mortgage, touching the execution of another instrument to some other person, for a wholly different purpose, and its communication or failure to communicate it to the party receiving the mortgage, as the rule of priority. The cases cited to support this one-transaction theory, are not, as we read them, pertinent, in view of the construction given by the Supreme Court of Ohio to section 6343 of the Revised Statutes. It is under this section of the Revised Statutes, which forms one of the sections of the insolvent debtor's act, that this one-transaction theory to be applied to mortgages and deeds of assignment,

is sought to be maintained. That section has been fully construed, and every word in it judicially determined by the Supreme Court of Ohio, in a series of cases. We believe a reference to and citation from them, will satisfy this court that whatever is open for construction under the laws of other states, there is no longer any room for doubt as to what the section means in the State of Ohio, and the rules have become so settled, and been so long followed in Ohio, as rules of property, that whatever might now be the view of this subject, in the light of the decisions named in other states, this court will not disturb the construction given in the cases to which we are about to refer.

In *Atkinson* v. *Tomlinson*, 1 Ohio St. 240, the court, construing this provision of the law, say:

" . . . We believe that it has been universally held, in the absence of any statutory provision to the contrary, that voluntary assignments, made *bona fide* by debtors to trustees for the benefit of creditors, will be supported, though preference is given to part of the creditors, in exclusion of the rest. United States Digest, 258, and cases there cited.

The statute of 1838 has changed the general rule of law on this subject, not by declaring such assignments void, but by directing that property thus assigned shall inure to the benefit of all the creditors, without reference to the preference provided for in the assignment; and this, although the assignment may have been made in good faith.

That statute provides: 'That all assignments of property in trust which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be held to inure to the benefit of all the creditors in proportion to their respective demands.' Swan's Stat. 717.

Does this statute then apply to the case of a creditor taking a mortgage or other security for his debt, on the property of his insolvent debtor? On the part of complainants it is contended that it does, and we are referred to the case of *Mitchell* v. *Gazzam*, 12 Ohio, 315, as a decision in point. That decision, we are bound to admit,

sustains the proposition, which leaves the single question for consideration, whether the decision is in accordance with law. In the first place, we would say that the language of the statute of 1838 would not strictly apply to a case like the present; that of a creditor taking an assignment of property to secure a debt of his own, where that is the sole object of the transaction, and where the relation of mortgagor and mortgagee is created between the parties. The language of the statute is very explicit, and its operation limited by a number of descriptive and qualifying terms. It must be a conveyance in trust, which is made to trustees with the design to prefer one or more creditors to the exclusion of others, etc. Now, this is not the language by which we would expect any one, either in common or legal parlance, to describe the fact of a creditor taking security from his debtor. The language here would certainly be a very awkward mode of expressing such a transaction. If the legislature had intended to bring such transactions within the statute, they would certainly have expressed it by providing, in addition, that all securities given in view of insolvency should come within its provisions. But the transaction described in this statute is one that conveys to the mind a very definite idea, wholly distinct from the fact that the person to whom the conveyance is made is a creditor.

The court, in the case of *Hull* v. *Jeffrey*, to which we have before referred in speaking of the statutes of 1835 and this statute, speak of the evil that this legislation was intended to prevent. They say: 'During the commercial embarrassment a few years since, debtors, in view of insolvency, adopted a plan of assignments to trustees, either to create inconvenient embarrassments upon pursuit of debts, or to preserve their property from a compulsory sale, or to impose terms upon creditors, or to secure some other profitable result to themselves. Examples of these practices may be found in 6 Ohio, 293; 7 Ohio (part 2), 264.' The court further say, after referring to the provisions of the statutes of 1835 and 1838, conveyances, other than those made to trustees, are not affected by either statute. Making an assignment to trustees to pay debts is one thing, securing a debt is another and very different thing. But it is said in *Mitchell* v. *Gazzam*, 12 Ohio, 335, that the object of the statute of 1838 was to cut off preferences, by debtors in failing or insolvent circumstances, of favored creditors, and to secure a fair distribution to all creditors,

in proportion to their respective demands, and that the statute would be liberally construed to effect that object.

Now, it might be very desirable to have the effects of an insolvent debtor divided amongst his creditors *pro rata*, without permitting any preference or advantage to be obtained among them. But we think the statute falls very far short of effecting or attempting to effect that object. To accomplish this, it would be necessary, after the fact of insolvency existed, to prevent the debtor from making a sale of his property in payment of a debt; to prevent a creditor from taking advantage of a judgment by execution, or from taking a judgment by confession; to prevent the debtor from selling his property and paying off any of his debts; in all these ways, the equal distribution of a debtor's effects may be prevented as effectually as by securing a debt by an assignment of property to the creditor. And yet no one has ever contended that the statute ever applied to any of the above cases. Indeed, since the decision of *Mitchell* v. *Gazzam*, it has been a very common practice, in place of taking security on the property of a failing debtor, to have the debtor confess a judgment, and, upon execution, appropriate his property to the payment of such judgment. If the legislature intended, by the statute of 1838, to insure an equal distribution of the effects of an insolvent debtor amongst his creditors, under the most liberal construction that can be given to it, they have fallen far short of effecting that object."

Again, in *Harkrader & Crane et al.* v. *Lieby et al.*, 4 Ohio St. 602. On page 609, the court say:

"This statute was not designed to supply the place of a bankrupt or insolvent law by compelling an equal distribution of the property of an insolvent debtor amongst his creditors; and the attempt to do so, by preventing him from using it in the payment or security of particular creditors, would have been little less than absurd, while it was confessedly within their power to obtain the same preference, by liens or levies, upon judgments confessed by him. Such a construction of the statute finds no warrant in its language, or the objects and purposes for which it was enacted.

To bring a case within the operation of the law, there must be a transfer or conveyance of property, or some valuable interest belonging to the insolvent debtor, in view

of his insolvency, to be held by the person taking it, for the benefit of some one or more of the creditors of the debtor other than himself. . . ."

Again, in *Dickson* v. *Rawson*, 5 Ohio St. 218. On page 221, the court say:

"Ranney, C. J. In the carefully considered cases of *Doremus* v. *O'Hara*, and *Atkinson* v. *Tomlinson*, 1 Ohio St. 45, 241, as well as in *Bloom* v. *Noggle*, and *Harkrader* v. *Leiby*, 4 Ohio St. 45, 602, the extent, operation, and proper construction of the act of March 14, 1838, relating to the assignment of property by insolvent debtors, in trust, with the design of preferring some creditors to the exclusion of others, were fully discussed, and the conclusions of this court have been explicitly stated.

It is only necessary now to repeat '*that the act does not extend to or in any way affect conveyances or mortgages made by a failing debtor to his creditor for the purpose of paying or securing his debts;*' but that it does control every transfer or conveyance of property, whether by mortgage or otherwise, made by an insolvent debtor, in view of his insolvency, to be held by the person taking it, for the benefit of some one or more of the creditors of the debtor other than himself. To bring the case within the operation of the statute, '*the conveyance must be in trust, and the person receiving the property thereby constituted a trustee for some one or more of the creditors of the debtor to the exclusion of others.*' Whether it is so in trust, and the assignee or grantee such trustee, depends upon the question whether, by the terms of the instrument or by necessary implication, he is liable to account to the preferred creditor for the property in his hands, and for the manner in which he disposes of it. If a court of chancery, at the instance of a creditor, would compel him thus to account, the character of the transfer and his own position are thereby determined; and the statute then steps in and enlarges the trust, and makes it inure to the benefit of all the creditors, and distributes the fund to all, in proportion to their respective demands."

To the same effect is *Justice* v. *Uhl*, 10 Ohio St. 170.

These decisions of the Supreme Court of Ohio, seem to settle beyond controversy the construction to be given to section 6343, and, in the language of that court, that

section, and the act of which it forms a part, "*does not extend to, or in any way affect conveyances or mortgages made by the failing debtor to his creditor for the purpose of paying or securing his debt.*" And to bring the case within the operation of the statute, the conveyance "*must be in trust, and the person receiving the property thereby constituted a trustee for some one or more of the creditors of the debtors to the exclusion of others.*"

In the case at bar, it is not pretended that the mortgages were intended or given to secure to the mortgagees any other debts than the debts therein named. Each mortgage was given to secure the specific debt of the mortgagee, and no other, and for no other purpose, so that the instrument thus executed and delivered to the mortgagee was an instrument separate and apart from every other instrument, secured only the debt therein named, and the mortgagee was not a trustee in any sense for any other creditor of the debtor.

It is not pretended that it was specifically agreed between the mortgagor and the mortgagee, at the time the mortgage was given, that the mortgages thus given and delivered should be considered as one instrument, and should form a part of the general deed of assignment, which of necessity they must do, to give any color to the claim made by the plaintiffs in error.

It is not claimed that the mortgagees agreed to take their mortgages in trust to secure any other person, or any other debt than the debt owing to them. No other creditor of the insolvent debtor could compel any one of the mortgagees to account to him in a court of equity for the property thus received. The only ground upon which this extraordinary one-transaction theory rests is, that at the time of the giving of the mortgage there was a purpose in the mind

of the mortgagor to execute a general deed of assignment, which he had a right to execute, as well as give any preference he chose to any creditor in exclusion of the others. How is it possible to make the purpose on the part of the insolvent debtor to do what he had the right to do, to wit: execute a deed of assignment for the benefit of creditors, destructive of the other right he possessed to prefer any creditor, even though he was insolvent, to the extent of conveying to that creditor his entire estate.

The mortgages in question embodied the only contract existing between the mortgagees and the mortgagor. It is not claimed that any trust was assumed toward any other creditor or person by the mortgagees. The only thing, as we have stated, upon which the claim rests, that these mortgages are conveyances in trust, under section 6343, for the benefit of all the creditors, is that these mortgages are to be treated as a part of the deed of assignment, because there was present in the mind of the mortgagor, at the time he executed them, the purpose to execute a deed of assignment for the benefit of creditors, whether declared or undeclared, would seem to us to make no difference.

It is contended that this one-transaction theory has the merit of securing an equal distribution of the assets of the insolvent debtor among his creditors. And it is claimed that the just and equitable rule to be applied to one who has become insolvent is to prohibit him from the time of that insolvency from making any preferences.

This is best answered by the language of the Supreme Court of Ohio, in *Atkinson* v. *Tomlinson*, *supra*:

"Now, it might be very desirable to have the effects

of an insolvent debtor divided amongst his creditors, *pro rata*, without permitting any preference or advantage to be obtained amongst them, but we think the statute falls very far short of effecting or attempting to effect that object. To accomplish this, it would be necessary, after the fact of insolvency existed, to prevent the debtor from making a sale of his property in payment of a debt; to prevent a creditor from taking advantage of a judgment by execution, or from taking a judgment by confession; to prevent a debtor from selling his property and paying off any of his debts; in all these ways, the equal distribution of a debtor's effects may be prevented as effectually as by securing a debt by an assignment of property to the creditor. And yet no one has ever contended that the statute ever applied to any of the above cases."

As we have heretofore stated, this one-transaction theory and claim is a new one in the history of Ohio. Looking at the statute of Ohio, upon the construction of which appellant's claim rests, and to borrow the language of its Supreme Court in answer to it, we desire to say: "*If the legislature intended, by the statute, to cover such a case, they have fallen far short of effecting that object.*"

Appellants do not contend that section 6343 prevents a creditor, even where the debtor has, in fact, determined to make a deed of assignment, and executed the same, from taking advantage of a judgment by execution, or from taking a judgment by confession, or from preventing the debtor from selling his property and paying off any of his debts; and, as the Supreme Court of Ohio has said, no one has ever contended that the statute ever applied to any of the above cases.

Appellants ~~Plaintiffs in error~~ concede that the vigilant and diligent creditors who, by judicial process, acquire a preference, even where the debtor had determined to assign, and has even executed the deed of assignment, but which has not been recorded, may hold their preferences; but that

the case of the execution and delivery of a mortgage is not the case of a diligent or vigilant creditor, and is not to be protected, but, by section 6343, is expressly excluded from protection. This claim is to ask this court to expressly reverse the decisions of the Supreme Court of Ohio, which, for over a quarter of a century, have existed as a rule of property, under which property has been acquired, transferred, and is now held.

The exact question of a creditor taking a mortgage or other security for his debt on the property of his insolvent debtor was determined in *Atkinson* v. *Tomlinson*. It was sought, in that case, to create the very distinction which plaintiffs in error seek to create in this case, namely, that section 6343 did not protect a mortgage taken by a creditor to secure his debt on the property of his insolvent debtor, but avoided it. The court, in that case, expressly overruled the claim made by plaintiffs in error; and, speaking of the statute, said:

"The language of the statute is very explicit, and its operation limited by a number of descriptive and qualifying terms. It must be a conveyance in trust, which is made to trustees, with the design to prefer one or more creditors to the exclusion of others, etc. Now, this is not the language by which we would expect any one, either in common or legal parlance, to describe the fact of a creditor taking security from his debtor. . . .

But the transaction described in this statute is one that conveys to the mind a very definite idea, wholly distinct from the fact that the person to whom the conveyance is made is a creditor. . . .

Now, it may be said, that the mortgagee is, in some respects, a trustee, but this arises merely as an incident to his relation as mortgagee, and is not the kind of trustee designated in the statute. We suppose that the legislature, as the language imports, intended to provide for a case where a trustee is interposed, with the controlling intent on the part of the debtor, of giving one creditor an ad-

vantage over another; and that the statute does not apply to the case of a creditor seeking and obtaining, in good faith, a lien on the property of his insolvent debtor, for the sole purpose of securing his debt. So far as the case of *Mitchell* v. *Gazzam* holds differently, that decision is not sustained by law.

Now, in the present case, the defendants were the sureties of Tomlinson; they took an assignment of about enough property to pay off their liabilities for him; and, although they showed themselves very anxious to obtain the security, as all men would be under similar circumstances, yet, securing themselves appears to have been their sole object, and we think they had a legal right to do it.

This doctrine is expressly laid down in the case of *Fassett* v. *Traber*, 20 Ohio, 540, and in *Doremus* v. *O'Harra*, *ante*, 45."

This has been regarded as the settled law of Ohio for over thirty years.

A deed of assignment for the benefit of creditors is an instrument adverse in right to the mortgage on the property given to the creditor. As we have heretofore said, the instruments are contending mortgages. It is idle to say that they are one, or can be one and the same transaction. It is to permit parol testimony to be introduced to contradict their express terms, and the purpose of the mortgagor in giving them to the mortgagees, and the mortgagees in receiving them at the time they are executed and delivered.

In this case, by all that is averred, by all that appears in the record, and by the instruments themselves, it is clear that it was the purpose and intent of the mortgagor to secure the debts of the mortgagees as against the general assignment for the benefit of creditors. It was neither the agreement nor the purpose nor the intent of the parties to make them one and the same transaction. With the clear right to prefer and secure the mortgagees, and with the

passage of resolutions by the corporation so to secure, and the execution of instruments in pursuance of that resolution of the board of directors, how can it be said that there was such a purpose, intent, contract, or agreement on the part of the mortgagor as to make the deed of assignment and the chattel mortgages one and the same instrument, and to have one and the same effect? The purpose of the failing debtor was to secure the creditor, and having secured the creditor preferred, to make an assignment of what remained to it of its property for the general benefit of creditors. To sustain this one-transaction theory is to say that the debtor and creditor did, and intended to do, the exact opposite of what they did and intended to do.

It is not contended in this case, and can not be, that the mortgagees consented to be trustees for any other creditor, or that they consented to any arrangement that would render their securities invalid. On the contrary, they sought to obtain for themselves valid securities, and did, in fact, obtain the security which, months before, the corporation agreed to give them. Such being the case, how can it be said that the giving of the mortgages and the execution of the deed of assignment were one and the same agreement, one and the same act, to which all parties assented, and by which all the parties were bound, when the mortgages were taken as against the deed of assignment, and were intended by all the parties to the transaction to operate as against the deed of assignment and to be prior in right thereto?

In the *Merchants' National Bank* v. *T. J. Nottingham M. & S. Co.*, 15 Law Bulletin, 8, the Superior Court of Cincinnati in general term has a very full discussion of the questions touching the validity of mortgages given under circum-

stances somewhat similar to those in the case at bar. The court held the fact that the mortgages may have been executed at one and the same time with the deed of assignment, does not constitute them an assignment in trust. In the states where mortgages given under similar circumstances have been declared void, the decisions have been based on the peculiar language of their statutes, and the construction given to that language, and the courts in passing on these statutes in the various cases have stated that the policy of the state, as evidenced by its law, was to prevent preferences. Ohio has no such policy. On the contrary, it allows any preferences except those coming within the exceptions stated above.

In the case cited from 10 Ohio St. 172, the debtor in contemplation of insolvency, and having in fact determined to make an assignment, at practically one and the same time disposed of all of his property, part of it by way of mortgage to various creditors, and the balance by transfer to a creditor. The mortgages were held not to be trusts. The transactions were not considered one transaction in law. Our law does not distinguish between diligent creditors who levy an execution, and a creditor to whom a debtor voluntarily gives security, and give to the former more rights than to the latter, although the laws of other states may make such a distinction. The mortgages are complete and separate instruments. There is no allegation of mistake. When it is alleged that the mortgage is made in proper form, it is inconsistent to say that it is a part of a general assignment; and for the purpose of fixing the rights of the parties, and determining the validity of the securities, it makes no difference whether they are given one year before the deed of assignment, or one minute before the deed of assignment. The time of the record of

the instruments fixes, as we have said, the rights of the parties, in the absence of fraud. A deed of assignment by the insolvent law of Ohio takes effect from the time of its delivery in the Probate Court. And any lien obtained on the property of the assignor prior to the delivery of that deed, however obtained or whenever it may have been executed, is a valid lien, prior in right to the deed of assignment.

This construction of the law of Ohio is supported by the decisions in other states.

In *Wilson* v. *Berg et al.*, 88 Pennsylvania State, 167, the court, on page 172, in discussing the one-transaction theory, say:

"Hence, although the intention of the debtor was to remove from the operation of the subsequent assignment a portion of his estate, and his conduct produced that result, yet the validity of the assignment is not thereby impaired. The preference was not in and by the instrument, through and by means of which the debtor surrendered to his creditors all dominion over his property. Id. No law compels a debtor to make an assignment for the benefit of his creditors. It permits him so to do, and directs as to its effect when done. Prior to such action, except as against a bankrupt law, he has undoubted right to prefer any of his creditors, by a conveyance or a transfer of property, or by a confession of judgment, although he may thereby hinder or forever prevent his other creditors from collecting their just demands. In case of a general assignment the law contemplates that the assignor shall pass over all his estate of every kind which he then owns. When that is done the assignment is in accordance with law, and the effect given to it by law can not be in fraud of any of his creditors, although the claims of some of his creditors may be ripe for execution, and the debtor have property out of which they might be collected; yet an assignment by which they will receive only a *pro rata* share, with other claims, not even due, works no legal fraud. The fraud that is forbidden arises from acts done contrary to law or equity. It may result from a disregard of proper forms, or, if they be observed, from doing acts with the inten-

tion of reaching results not sanctioned by the authorities. As the law implies no fraud in a debtor transferring property to one creditor, to the exclusion of his other creditors, before an assignment, and with a view of making it, so no inference of fraud, in the assignment, can arise from a transfer at any time of all the property he then has, for the benefit of all his creditors. . . .

If an assignment be made in the form and manner provided by law, and duly recorded, so as to pass all the property of the assignor, we can not see how the motive existing in his mind can affect its validity. If in morals the motive be a bad one, yet in law it produces no forbidden result."

In the case of *Holt & Chambers* v. *Bancroft et al.*, 30 Alabama, 193, Chief Justice Rice, in his dissenting opinion, on page 205, says:

"The preference given to Alexander Chambers, which is assailed by the complainants in this case, was given by an instrument executed on the 9th of May, 1854, and which is evidently not a general assignment, but a deed of trust. But my brothers hold, that the preference is rendered inoperative, merely by the *intent* which existed on the part of the debtors at the time they executed the deed of trust, to make at a future time a general assignment, and by the actual making of a general assignment eight days after the execution of the deed of trust. I can not agree to that.

The intent to make the general assignment was not an unlawful intent, nor an intent to do an unlawful act; for the debtors had the right to make a general assignment. The case then stands thus: The debtors have exercised their legal right of preferring a creditor by deed of trust; at the time they exercised that lawful right they had the intent to exercise on some future day another lawful right (to wit, to make a general assignment), and eight days afterwards they did exercise that lawful right; and the legal result, as announced by my brothers, is, that the first exercise of their lawful right is vitiated by the lawful intent to exercise another lawful right, and the actual exercise of that lawful right eight days afterward!

I can not believe the law to be so inconsistent with itself. I am unable to perceive how the exercise of two

lawful rights accompanied by no unlawful intent, can be considered an evasion of the law; or how the intent which may exist at the exercise of one lawful right afterward to exercise another lawful right, can be regarded as an attempt to evade the law. . . .

It seems to be conceded by my brothers that the two instruments could not be considered as one, for any purpose, but for the *intent*, at the time of the execution of the first, to execute the second. That intent does not appear in either instrument. The instruments are eight days apart, and neither refers to the other. The mere intent, at the making of the first, to make the second (that intent being undisclosed in either) can not make the second instrument a part of the first. They are separate and distinct, in fact and in law.

As to the first instrument, the deed of trust, there is nothing unlawful in the object, nothing unlawful in the means, nothing unlawful in the effect. . . .

The authorities relied upon by my brothers are not applicable to this case, because they are founded upon statutes materially different from our code.

One of the modes of preferring a creditor by the code, was by confession of judgment by the debtor, in favor of the creditor. Suppose now that a debtor adopts that mode, and that, at the time he confesses judgment, he has the intent to make a general assignment after the execution has issued to the sheriff, and the lien thereby acquired by the creditor; suppose, further, that after the lien has thus been acquired, the debtor does make the general assignment, which he intended to make; in such a case, could any court hold, that the confessed judgment and execution thereon constituted part of the general assignment, or that the intent to make the general assignment destroyed the preference and lien created by the confessed judgment and execution thereon? It seems to me that a court might as well hold that, as to hold that the deed of trust in this case was part of the general assignment executed eight days after the deed of trust was executed, or that the preference given by the deed of trust was destroyed by the subsequent general assignment."

In *Bailey* v. *The Kansas Manufacturing Co.*, 32 Kan. 73, the first paragraph of the syllabus is as follows:

"Instruments not a single transaction. Where an in-

solvent person executed two chattel mortgages in good faith for a valuable consideration for the benefit of certain creditors, and such mortgages were duly filed, and thereafter, and upon the next day, a deed of voluntary assignment for the benefit of all of his creditors was executed by him, the execution of such instruments does not constitute a single transaction, nor do such chattel mortgages and the assignment defeat each other, as each is valid."

The opinion of the court begins on page 76, and the law of Kansas, as we understand it, is almost similar to the law of Ohio. On page 79, the court say:

"If the chattel mortgages therein referred to were executed in good faith and for a valid consideration, the first conclusion of the trial court can not be upheld. The several instruments executed by A. McDonald were not intended to constitute a general assignment for the benefit of creditors, and the findings of fact do not support such a conclusion. It is well settled that an insolvent, as long as he retains a *jus disponendi* of his property, may appropriate it to the payment of his debts, and may prefer a creditor. He may use all his property this way, or he may so use a part and make a general assignment of the remainder. . . .

At the time of the execution of mortgages to Maria McDonald and to The Gibbs & Sterrett Manufacturing Co., A. McDonald had possession of the goods in controversy, and the right to dispose of the same. There is nothing in the assignment act that prohibits the execution of chattel mortgages, or prohibits a transfer, by pledge or otherwise, of any kind of property to a creditor to secure the payment of a debt due to such creditor; nor is the execution of chattel mortgages, or the transfer of property to secure a creditor, against the spirit or intention of a statute regulating voluntary assignments. *Tootle, Hosea & Co.* v. *Coldwell*, 30 Kan. 125. . . .

It is difficult to say upon what principle or for what reason a chattel mortgage, executed in good faith for the benefit of certain creditors upon the same day that the deed of general assignment is executed, must be considered a single transaction."

In the case of *Tootle, Hosea & Co.* v. *Coldwell*, 30 Kan.

125, on page 136, the court discusses the one-transaction theory, and says:

"V. Plaintiffs in error, in their oral argument, but not in their brief, present one other question for consideration by this court. They claim that the several mortgages executed by the defendant to his several creditors, and the assignment of his book accounts to such creditors, constitute together a voluntary assignment to a trustee for the benefit of creditors, under section 1 of the act of 1868, regulating voluntary assignments for the benefit of creditors (comp. laws of 1879, ch. 6, p. 99). Or that the execution of said mortgages and assignment is in violation of said act; or, that, in some other manner, the execution of said intruments will, by virtue of such act, sustain the attachments obtained by the plaintiffs in this case. Now, waiving the irregular manner in which this point has been presented to this court, we would say that we do not think the chattel mortgages and the assignment executed under said act were in violation thereof. They were not executed to a trustee, as voluntary assignments under that act are required to be; but they were executed directly to the creditors themselves; and they were not executed in the manner in which that statute requires voluntary assignments to be executed. The mortgages were executed simply as chattel mortgages, and the assignment of the book accounts was executed just as an assignment of a book account should be; and no one of these instruments was executed in violation of said act, and there is nothing in said act that prohibits the execution of chattel mortgages, or that prohibits the transfer by assignment or otherwise of any kind of property to a creditor, to secure the payment of a debt due to such creditor; nor is the execution of chattel mortgages, or the tranfer or assignment of property, against the spirit or intention of said act."

Appellants, in their brief, discuss this one-transaction theory at length, and cite a number of authorities in support of it. They admit in their brief "*that the mortgagees in the chattel mortgages were not trustees under section* 6343;" that so far as these instruments are concerned, and their relation to them, they secured to them no other debts than their specific debts, no trust relation was created on the

part of the mortgagees toward any other creditor, and no other creditor was preferred by the instruments, so that no creditor of the corporation mortgagor could compel any of these mortgagees to account for the proceeds of the property mortgaged to them to secure the debt due by the corporation.

Appellants also claim: "*There are no diligent creditors in this case,*" and further, "that it is not necessary for them to claim any thing in this case *inconsistent with the admitted proposition that a bona fide creditor can secure preference from an insolvent debtor in Ohio by a payment, absolute transfer of property, or mortgage, which will be upheld as against the general creditors.*"

Under the decisions of the Supreme Court of Ohio, we fail to see what there is left in this case to occupy this court's attention after these admissions. The Ohio Supreme Court has expressly decided that a creditor may take a mortgage from a failing debtor in contemplation of insolvency and secure his debt, and that the debtor may voluntarily prefer the creditor by tendering him such mortgage. It is not in Ohio a question of diligence or vigilance, but solely a question of the power of the debtor to give the preference voluntarily and of the creditor to receive it; and that the debtor in giving it to the creditor, and the creditor in receiving it, confines the operation of the preference to the debt of the creditor receiving it, and creates no trust and annexes no condition other than the securing of the debt which the instrument is given to secure and prefer.

Again, it is stated by appellants: "*It is the debtor's acts, and not the acts of the creditors, which are important in determining the operation of the statute.*" This is expressly contradictory of the language of the Ohio Supreme Court in

Atkinson v. *Tomlinson*, *supra*, in dealing with the case of *Mitchell* v. *Gazzam*, *supra*. It is the settled law of Ohio that it is the acts, agreements, and intent of the creditor that determine whether the security he receives and the preference that is given to him is, under section 6343, such an assignment in trust to a trustee or trustees in contemplation of insolvency as inures to the equal benefit of all creditors.

It is assumed by appellants in their brief, that the exact question presented upon this record has never been before the Supreme Court of Ohio. If by that statement is meant that "section 6343" and all cases coming within its terms, has not been construed, defined, and settled, then the statement is not sustained by the decisions of that court. If, on the other hand, it is meant that this court is called upon to consider a question as new and undecided which is evolved from the ingenuity of counsel, the wish being father to the thought, and is asked to reverse, and substitute the mental processes of a debtor, for the settled rules of construction given to section 6343, which have for over a quarter of a century prevailed in Ohio, and under which property has been bought and sold and the estates of insolvents been administered, then the statement that the question is new may be sustained.

It is claimed, in the brief, that all the Ohio cases cited "*deal with a state of facts essentially different from the case at bar.*" We do not so understand them. As we have before found, in the case of *Justice* v. *Uhl*, 10 Ohio St. 170, the preferences or assignments disposed of the entire property of the insolvent, and it is reasoning with shadows and not with substances to say that the insolvent debtor may convey by way of preference his entire estate of every kind to a creditor, to the exclusion of all others, and because he

does not execute a deed of assignment thereafter, which would convey nothing to the assignee, that that preference is valid; whereas, on the other hand, if he does make such a deed of assignment, or has a purpose to make one, at the time he creates the preferences, and executes it six months thereafter, the preferences are void, because they and the deed of assignment become one and the same instrument.

In all the cases decided by the Supreme Court of Ohio, the debtor was insolvent, created the preferences in contemplation of insolvency, and in many cases disposed of the entire property to the creditors whom he thus preferred. As we have said, it is dealing with the shadows, and not with the substance of things, to say that preferences under these circumstances are valid, whereas the same preferences given where the debtor has in his mind a purpose to make a deed of assignment which he afterward executes or fails to execute, which he afterward changes or carries into execution, renders void that which otherwise would be valid.

The one-transaction theory of appellants, if maintained, would invalidate every preference given or secured by the diligent or lazy creditor after the debtor had formed the purpose in his mind to make a deed of assignment, whether it was a judgment by confession, a payment of money, an absolute transfer of property, or mortgage. Diligence or laziness is not the test in Ohio as to the validity of preferences given by an insolvent debtor, and diligence or laziness, as we view it, can not affect this one-transaction theory, which rests solely upon the mental processes or purposes, declared or not declared, of the debtor at the time he gives the preference.

It is claimed that the trustee who acts in the case at bar, to bring it within section 6343 as against these mortgages, is John R. Sayler, and it is argued that although the

contract of the parties was that the chattel mortgagees were not trustees, that their instruments were given to secure them preferences which the insolvent corporation had a right to give, yet, because the mortgagees did not take possession of the property, therefore John R. Sayler is the trustee contemplated by section 6343, which renders the mortgages and general assignment for the benefit of creditors one, and void.

Now, John R. Sayler is not named in the mortgages. It was not agreed that he should be trustee. It was not agreed, at the time the mortgages were given, that they should secure any other debt than the debt therein named. How could this court, under section 6343, acquire the right to legislate, create a bankrupt act, and make any other contract for the parties, and create a trustee where none was intended to exist by the parties? In the case of preferred creditors, where the preferences are in the deed of assignment, the creditor has no rights except to call the trustee to account. But in a case of chattel mortgage, under condition broken, or before condition broken, notwithstanding the deed of assignment, all the rights of the mortgagees exist in and to the property in the creditor himself, and not in a trustee. The mortgagees hold not in the right of the deed of assignment, or of a trust deed to a trustee, but they hold in the right of the mortgages given to them, and by force of them. Section 6343 is express in its terms, and differs from the law of every other state cited in the brief for plaintiffs in error in this, viz., that it is assignments "*in trust to a trustee or trustees*," made in contemplation of insolvency, with intent to prefer one or more creditors, which shall inure to the equal benefit of creditors. The Ohio Supreme Court has expressly declared that the construction to be given to that language of the statute of Ohio is that the

instrument, under which and by which a creditor claims a preference which he can not hold, shall be an instrument which in and of itself creates a trust under which the trustee may be compelled to account in a court of equity to the creditor preferred. But the preferences in the case at bar are not created by a conveyance to a trustee for the use and benefit of the chattel mortgagees. They are separate, independent contracts, and instruments which fix the rights of the parties therein named, and all parties claiming thereunder or against them. The character of the holding of John R. Sayler under the deed of assignment can be tested by this question. Suppose that section 6343 did not exist, and suppose that the deed of assignment had been first placed on record, so that it was prior in time of its delivery to the Probate Court to the delivery of the chattel mortgages to the recorder, could the chattel mortgagees have insisted upon the mortgages and the deed being one and the same instrument, and thus secure to themselves preferences? At common law, they would have been entitled to the preference, if they were one and the same instrument. Can it be contended that if the chattel mortgagees in this case had failed to file their mortgages until after the delivery of the deed of assignment to the Probate Court, that on the theory that they were one and the same transaction, the same as if set out and embodied in the deed of assignment to John R. Sayler, that they could have insisted on the payment of their claims prior to the general creditors, in the absence of any provision of law vitiating preferences created by the deed of assignment, as provided in section 6343? And if they could not, why not? Doesn't this at once destroy the one-transaction theory? Does it not show that in states where the preference to the creditor may be lawfully given by and in the deed of general assignment,

that the chattel mortgagees in this case could not have maintained the claim of one transaction, and thereby secured their preferences, in the event of failing to record their mortgages in time, but would have to stand or fall on the instruments which expressed the contract under which they took their preferences.

"The laws of the several states cited by counsel for appellants, and the construction given to them by the various decisions cited, will show that in no case is the language of the statute the same as the language used in section 6343." The law of Iowa is, "*that no general assignment of property by an insolvent in contemplation of insolvency, etc.*" This is not section 6343. And it may be noted that the distinction that has been drawn by the Iowa courts between a mortgage and the preference acquired by the diligent creditor, is a distinction which we have seen does not exist in Ohio. The language of the court in 19 Iowa is as follows:

"In that case, the insolvent, simultaneously with the execution of the assignment, conveyed lands in payment of one creditor, and discharged another debt by payment of money, and a third by the payment partly in money and partly by the transfer of promissory notes. The court held that the insolvent had the right in that way to prefer creditors."

It will be noticed that these preferences were given simultaneously with the execution of the assignment, and were all a part of one transaction, and yet were held valid. None of the preferences, however, were those given by way of mortgage; quoting from the same case, the court say:

"By payment, the money or the property is transferred directly to the creditor, who acquires title thereto by the transaction from the debtor himself. Thus it will be seen that payment could not be a part of the transac-

tion and assignment by which the property is conveyed in trust to the assignee or trustee. . . . But if, with the intention of disposing of all his property for the benefit of his creditors, he mortgages a part and assigns the remainder, these constitute one transaction."

The Supreme Court of Ohio has, in clear and unmistakable terms, refused to recognize any difference between a preference given by way of mortgage and that by way of payment or transfer of property, and has placed them on the same ground, and upheld them as of equal validity. It will be noted in the Iowa cases, so far as appears from decisions cited by appellants, that the one-transaction theory is confined to mortgages and a deed of assignment, the court having made a distinction as to preferences which does not exist in Ohio between those of payments of money, transfers of property, and the execution of a mortgage.

The law of Alabama is referred to in appellant's brief. It is cited thus:

"Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors," etc.

This is not section 6343.

In *Holt* v. *Bancroft*, 30 Ala., we find this language:

"The object of the statute was to prohibit all discrimination by a debtor making a general assignment, in favor of any of his creditors."

And is, therefore, a different law, with a different purpose, from the Ohio law.

The law of Maine is quoted in appellants' brief, and it will be noted that it is not the law of Ohio; as in the cases of Iowa and Alabama, it makes no reference "*to a trust or trustee*," and the same remarks apply to the laws of Mis-

souri, New Jersey, Oregon, Michigan, Wisconsin, and Illinois. These, we believe, are all the laws referred to in the brief of appellants. We desire to call attention to the operation of this rule of the mental processes of the debtor, as determining the one-transaction theory, in the case of *Root* v. *Potter*, 26 N. W. Rep. 682. There the mortgages given were dated July 12th, given to the creditors July 15th, and filed July 16th. The deed of assignment was executed on the evening of the 17th; and yet, in a state where the one-transaction theory prevailed, it was held that, although the debtor was hopelessly insolvent, and while in this condition did in fact execute and deliver the mortgages as preferences, even though they may have conveyed to the preferred creditors the entire estate; yet, because there was not present, on the 16th of July, in the mind of the debtor, a purpose to make a general assignment, the mortgages were upheld, even although that purpose came into his mind the next day, and the circumstances were in no way changed, and his condition was the same as on the 16th, and the deed of assignment was in fact executed on the 17th. This case illustrates, as well as any case can, what we claim to be the absurdity of the mental process theory. The mortgages were upheld, not because the debtor was not insolvent, not because a preference had not been created, not because there was an unequal distribution of the property among the creditors, but simply because there was not, at the time the mortgages were executed, a formed and determined purpose to make a general assignment for the benefit of creditors. If there had been, the court would have held the mortgages and the deed of assignment all one transaction, and, therefore, void. So that not the condition of the debtor, not equality among creditors, not agreement with creditors

preferred, not trust, secret or otherwise, but simply the absence or presence, in the mind of the debtor, of a purpose to make a deed of general assignment for the benefit of creditors, is to validate or vitiate mortgages given by way of preferences.

An examination of some of the cases cited by counsel for appellants will still further illustrate what we claim to be the absurdity of this rule. Between the execution of the mortgages or preferences, and the formal execution of the deed of assignment, a number of days elapsed; and yet, because the mortgages were executed when there was a purpose formed, in the mind of the debtor, to make an assignment, they were invalidated; whereas, in the case just cited from Michigan, although only one day intervened between the execution of the deed of assignment and the filing of the mortgages, the mortgages were held valid.

We submit, therefore:

First. That the statutes of other states cited by counsel for appellants in their brief are not similar to the law of Ohio; that in none of them does the language appear which is contained in section 6343, viz: "*Assignments in trust to a trustee or trustees*," etc., and that the decisions of these courts rest upon the peculiar construction of the statutes of the several states, and are not pertinent to the case at bar.

Second. That no distinction is made in Ohio between creditors acting with diligence and those not, and that a mortgage voluntarily given by an insolvent debtor is a preference of equal right with a judgment or any other preference secured by a so-called vigilant creditor.

Third. That the one-transaction-mental-process-and purpose theory is the substitution for well settled rules of law practicable in their application, of a rule which is im-

practicable of application, which offers a premium to perjury on the part of the insolvent debtor, and enables him, according to his interest or prejudices or hates, to validate or invalidate preferences which he may have given, and against whose conduct the creditor receiving the preference is powerless.

Fourth. That every case which can arise under § 6343 has been decided by the Supreme Court of Ohio; and that the construction given to that section embraces the case at bar and settles it in favor of the validity of the mortgages.

V.

MORTGAGES VOID BECAUSE OF OFFICER'S INTEREST.

It is contended that the mortgages are void, because O'Hara, president of the corporation, made these mortgages to be relieved from his stockholder's liability; but this can not be. By securing or paying these mortgage debts he could not thereby avoid paying his full liability, if the remaining debts of the company require it.

It is further contended that the preferences are void because two of the directors, George E. Gault and Charles O'Hara, both being insolvent, were indorsers on some of the notes secured by the mortgage to Robert Simpson. The mortgage was given to Simpson by the corporation to secure the debt of the corporation, for money it owed to him. The debt, it is conceded, is a valid debt; and that Simpson was not at the time the mortgages were given to him, and had not for some months prior thereto, been either an officer or a director of the corporation. The fact that two directors happened to be indorsers on some of the notes, does not invalidate the mortgage.

The Farmers' Bank v. *Whittle*, 78 Va. 739, 740; *Buell* v. *Buckingham*, 16 Iowa, 284; *Gordon* v. *Preston*, 1 Watts, 385; *Whitewell* v. *Warner*, 20 Vt. 425; *Ashurst Appeal*, 60 Penn. 290; *Bradley* v. *Farwell*, 1 Holmes, U. S., 483; *Corbett* v. *Woodward*, 5 Sawyer, 403.

An examination of the cases cited by counsel for ~~plaintiffs in error~~ appellants will show that the doctrine of the cases cited above has not been modified. In no case can the court find where the corporation, as in this case, was indebted to the creditor whom it sought to prefer, and had received from that creditor the full amount for which the indebtedness existed, even though on some or all of the notes given for its debt directors may have been indorsers; still that fact could not, and did not, vitiate the securities given. It seems clear to us that the fact that a director or officer may be the indorser of the corporation's paper held by the creditor, and which the mortgage is given to secure, does not, as against the creditor, vitiate the security, on the ground that the director has used his office for the purpose of preferring himself at the expense of other creditors.

We respectfully ask that the judgment of the court below be affirmed.

THOS. McDOUGALL,
Of Counsel for Appellees.